100405

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM [redacted] 1923

No. [redacted] 112

RED CROSS LINE, PETITIONER,

vs.

ATLANTIC FRUIT COMPANY.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

PETITION FOR WRIT FILED AUGUST 31, 1923.

CERTIORARI AND RETURN FILED DECEMBER 26, 1923.

(29,118)

(29,118)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 568.

RED CROSS LINE, PETITIONER,

vs.

ATLANTIC FRUIT COMPANY.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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a Received copy of the within record this 311st day of August, 1922. Hunt, Hill & Betts.

STATE OF NEW YORK,
County of New York, ss:

Vincent J. Di Bello being duly sworn deposes and says that he is over the age of 21 years. That on the 31st day of Aug., 1922, deponent delivered a copy of the within record to Hunt, Hill & Betts, 120 Broadway, New York City, attorneys for respondent herein, by leaving same with E. Keenan, a person in charge of said office. Vincent J. Di Bello.

Sworn to before me this 31st day of Aug., 1922. Reginald B. Williams, Notary Public, New York Co., Cl'k's No. 328. [Seal of Reginald B. Williams, Notary Public, New York County.]

1 **Supreme Court, New York County.**

In the Matter of the Petition of RED CROSS LINE for an Order Directing ATLANTIC FRUIT COMPANY to Proceed to Arbitration.

Notice of Appeal.

Please take notice that Atlantic Fruit Company hereby appeals to the Appellate Division of the Supreme Court, First Department, from the order of the Special Term of the Supreme Court, New York County, herein entered in the office of the Clerk of New York County on the 11th day of August, 1921, compelling the said Atlantic Fruit Company to proceed to arbitration and to appoint its arbitrator on or before the 20th day of August, 1921, and this appeal is taken from each and every part of said order.

Dated, New York, August 16, 1921. Hunt, Hill & Betts, Attorneys for Atlantic Fruit Company, 120 Broadway, Borough of Manhattan, New York City.

To William F. Schneider, Esq., Clerk of the County of New York; Loomis, Barrett & Jones, Esqs., Attorneys for Petitioner, Red Cross Line, 52 Broadway, New York.

2 **Order Compelling Arbitration.**

[Filed Aug. 11, 1921.]

[Title omitted.]

The above named petitioner having moved this Court by a notice of motion returnable April 21, 1921, for an order compelling arbitration and said motion having been adjourned and having duly

come on to be heard July 20, 1921, and after hearing Mr. Home L. Loomis in support of the said motion and Mr. John W. Crandal in opposition thereto and it appearing from the papers hereinafte mentioned that the Red Cross Line and the Atlantic Fruit Com pany on or about the 28th day of November, 1919, entered into contract in which it was provided as follows:

"23. That should any dispute arise between Owners and Charterers the matters in dispute shall be referred to three persons in New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision, or that of any two
3 of them, shall be final and for the purpose of enforcing any award, this agreement may be made a rule of Court."

and that pursuant to said contract the Red Cross Line duly ap pointed its arbitrator and that the Atlantic Fruit Company failed and refused to appoint its arbitrator,

Now, on reading the said notice of motion, the petition of the Red Cross Line, and exhibits attached thereto, the affidavit of Vin cent J. Di Bello verified the 13th day of April, 1921, the answe of Atlantic Fruit Company to the petition, the answering affidavit of Mr. T. O. Muller verified the 6th day of July, 1921, and of Mr John W. Crandall, verified the 1st day of July, 1921, the petition bond and notice of removal, and the order of Hon. A. N. Hand entered in the District Court of the United States for the Southern District of New York on the 27th day of June, 1921, remanding the petition herein to this Court, the same constituting papers num bered 1 to 18 inclusive as filed herein, and due deliberation hav ing been had, upon filing the opinion of the Court, it is, on motion of Loomis, Barrett & Jones, attorneys for the petitioner,

Ordered that the said motion be and the same hereby is in all respects granted with ten dollars costs, and it is further

Ordered that the Atlantic Fruit Company proceed to arbitration as provided for in the contract aforesaid and appoint its arbitrator on or before the 20th day of August, 1921, and within two days thereafter duly notify the petitioner of its said appointment.

Entered. W. P. B., J. S. C.

4 **Notice of Motion.**

[Title omitted.]

SIRS: Please take notice, that upon the annexed petition verified the 12th day of April, 1921, the undersigned will move this Court at Special Term, Part I, thereof to be held in the County Court House in the Borough of Manhattan, City of New York, on the 21st day of April, 1921, at 10:15 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order directing you to proceed to the arbitration of the claim of the petitioner herein as set forth in the annexed petition pursuant to Chapter 275 of the Laws of 1920, and granting such other and further relief as

the premises as to the Court may seem just and proper. Yours &c., Loomis, Barrett & Jones, Attorneys for Petitioner, 52 Broadway, Borough of Manhattan, New York City. To Atlantic Fruit Company, 61 Broadway, New York City.

5 [Title omitted.]

Petition of Red Cross Line.

To the Supreme Court of the State of New York, County of New York:

The petition of Red Cross Line, by its agent Bowring & Company, respectfully shows and alleges:

First. That at all the times hereinafter mentioned the petitioner was and still is a foreign corporation, duly organized and existing under the laws of the United Kingdom of Great Britain and Ireland, engaged and engaging solely in foreign commerce, and represented in the port of New York by an agent located at 17 Battery Place, New York City.

Second. That at all the times hereinafter mentioned Bowring & Company was and still is a domestic corporation and at all
6 the times hereinafter mentioned was and still is the lawful and duly constituted agent of the Red Cross Line, the petitioner herein.

Third. On information and belief that at all the times hereinafter mentioned the Atlantic Fruit Company was and still is a foreign corporation doing business in the City and State of New York by its agent, Bennett, Hvoslef & Company, and that at all the times hereinafter mentioned was the chartered owner of the Norwegian Steamship Runa.

Fourth. That on or about the 28th day of November, 1919, in the City of New York, the petitioner, Red Cross Line, by its agent, Bowring & Company, made and entered into a written contract or charter-party with the said Atlantic Fruit Company, whereby the said Atlantic Fruit Company as chartered owner of the steamship Runa agreed to let, and the petitioner as charterer agreed to hire, said steamship for one (1) round trip between any safe port and/or ports in Canada and/or other British possessions not north of the River St. Lawrence and/or the United States for the consideration of twenty-five thousand dollars ($25,000) per month as is more fully set forth in said contract or charter-party, a copy of which is hereto attached marked Exhibit A and made a part of this petition.

Fifth. That among other provisions in said charter-party is was provided as follows:

"3. That in the event of loss of time from deficiency of men or stores, breakdown of machinery or damage preventing the
7 working of the steamer for more than twenty-four hours at sea, the payment of hire shall cease until she be again in an efficient state to resume her service, re-delivered at place of accident or allowance therefor, and should she in consequence put into any port other than that to which she is bound, the port charges and

pilotages at such port shall be borne by steamer's owners. Also if any loss of time from crew or stores not being on board in time, or from repairs to hull and machinery, which are for Owner's account, not being complete after cargo and coals are on board and hour of sailing has been fixed by charterers and notice given to Captain, the time is lost to the Owner's account.

11. That the Captain shall prosecute his voyage with the utmost despatch, and take every advantage of wind by using the sails with a view to economize fuel, and shall render all possible assistance with ship's crew and boats. * * *

19. * * * The Act of God, the King's enemies, Fire, Restraints of Princes, Rulers and People and all other dangers and accidents of the seas, rivers, machinery, boilers and steam navigation throughout this Charter Party always excepted."

Sixth. That it was further provided in said charter-party in Article 23 and 31 thereof as follows:

"23. That should any dispute arise between Owners and Charterers, the matters in dispute shall be referred to three per-
8 sons in New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision, or that of any two of them, shall be final and for the purpose of enforcing any award, this agreement may be made a rule of Court. * * *

31. Where the word 'Owners' appears in this charter-party the words 'Chartered Owner' to apply."

Seventh. That in accordance with said charter-party the said steamship Runa was delivered to your petitioner by the said Atlantic Fruit Company at the port of Philadelphia on the 29th day of November, 1919, and entered upon the performance of the said charter-party.

Eighth. On information and belief that on the 6th day of December, 1919, the said steamship Runa cleared from the said port of New York for the port of St. Johns, normally an eight days run from New York. But her master did not prosecute said voyage with the utmost despatch. Although the steamer was ready to proceed in the evening of the 6th day of December, 1919, and the master was ordered by the charterer to proceed at that time, the master refused and neglected so to do until the following day, to wit, the 7th day of December, 1919. And thereafter, when within approximately 100 miles of his destination, to wit, St. Johns, Newfoundland, the master turned the said steamer about and proceeded to the Azores, distant from St. Johns about 1,300 miles, approximately the same distance as that between New York and St. Johns. At the Azores the said master kept the said steamer for a period of 21
9 days, leaving there only on the 5th day of January, 1920, and finally arriving at St. Johns on the 14th day of January, 1920, after having consumed on said trip from New York to St. Johns a total of 39 days instead of the number the charterer was reasonably entitled to anticipate, to wit, eight days. Both at the Azores and at St. Johns the master took aboard said steamer Runa excessive quantities of coal not required for the remainder of the

voyage even as prosecuted by the master. The said excess of coal over the quantity reasonably required amounted to 298 tons.

Ninth. That inasmuch as the chartered owner had under the said charter-party the right to withdraw the steamer from the charterer's service if the latter failed to pay hire in advance without offset or deduction at the times specified in said charter-party, and inasmuch as the charterer remained ignorant of the true state of facts set forth in paragraph Eighth above until the return voyage of the steamer from St. Johns had been concluded and extracts from the steamer's log had been furnished by the master and examined by the charterer, the latter had in the meantime, in order to prevent the earlier withdrawal of the steamer from its service and otherwise protect its rights, paid to the chartered owner under protest charter hire at the times stipulated in the said charter-party, including cost of fuel and other disbursements.

Tenth. That by reason of the facts set forth in paragraph Eighth above the petitioner overpaid to the chartered owner of the Runa hire and disbursements in the sum of Thirty-five thousand
10 two hundred fifty-six and 96/100 Dollars ($35,256.96), in which amount it was damaged and the payment of which sum on or about the 16th day of March, 1920, by letter to the said Bennett, Hvoslef & Company it duly demanded from the chartered owner, the said Atlantic Fruit Company, a copy of which letter is hereto attached marked Exhibit B and made a part of this petition.

Eleventh. That the said Atlantic Fruit Company has failed and refused to pay the said sum of Thirty-five thousand two hundred fifty-six and 96/100 Dollars ($35,256.96) or any part thereof, and has denied and disputed the facts set forth in paragraph Eighth above and has denied and disputed its liability in damages or to repay said overpaid charter hire to your petitioner from the causes therein alleged, as appears from a letter written by the said Atlantic Fruit Company to said Bennett, Hvoslef & Company under date of the 19th day of March, 1920, a true copy of which letter is hereto attached and made a part hereof and marked Exhibit B-1.

Twelfth. That because of the facts set out above, a dispute and controversy has arisen and now exists between your petitioner and the said Atlantic Fruit Company.

Thirteenth. That because of said dispute and controversy, in pursuance of said Article 23 of the said charter-party herein quoted, your petitioner on or about the 8th day of April, 1920, through its said agents by letter to Bennett, Hvoslef & Company, the said agents of the Atlantic Fruit Company, called upon and demanded
11 that their principal join with your petitioner in an arbitration of the said dispute, as provided by said charter-party, a copy of which letter is hereto attached marked Exhibit C and made a part of this petition.

Fourteenth. That thereafter and on or about May 4, 1920, said Bennett, Hvoslef & Company answered said letter of demand and enclosed a copy of a letter from their principal in which the said Atlantic Fruit Company stated that they would not submit the said dispute to arbitration. Copies of the said answer and the said copy

are hereto attached marked respectively Exhibit D and Exhib
and made a part of this petition.

Fifteenth. That thereafter, on or about May 10, 1920, your
tioner, through its said agents by letter to Bennett, Hvoslef &
pany, the said agents of the Atlantic Fruit Company, notified
Atlantic Fruit Company that it had chosen Mr. Richard D. Wri
to act as its arbitrator and that he had signified his willingne
accept such appointment and called upon the said Atlantic
Company to appoint its arbitrator in order that he and the said
trator of your petitioner might meet and choose the third and
ceed in accordance with the terms of said charter-party, a cop
which letter is hereto attached marked Exhibit F and made a pa
this petition.

Sixteenth. That thereafter, on or about May 14, 1920, said
nett, Hvoslef & Company answered said letter of May 10, 1920,
enclosed a copy of a letter from the said Atlantic Fruit Compan
which letter the said Atlantic Fruit Company reiterated its in
tion not to arbitrate said dispute and controversy; copie
12 said answer and copy are hereto attached marked respecti
Exhibit G and Exhibit H and made a part of this petitio

Seventeenth. That the said Atlantic Fruit Company has contin
to refuse to arbitrate said dispute and controversy and to appoin
arbitrator to act with the arbitrator of your petitioner, as prov
by said Article 23 of said charter-party, and still so refuses.

Eighteenth. That your petitioner has duly performed all the te
and conditions on its part to be performed.

Nineteenth. That heretofore on or about May 27, 1920, the
tioner herein filed in this Court a petition substantially in conf
ity with and asking for the relief prayed for in this petition;
thereafter the Appellate Division of this Court held that the arb
tion law of the State of New York was not applicable to contr
executed prior to the enactment of said law, whereupon petitio
contract having been executed prior to the said enactment it w
drew its petition pending the decision of the Court of Appeals on
question. In the meanwhile the said Atlantic Fruit Company
ing filed a libel against your petitioner for alleged unpaid cha
hire, etc., your petitioner answered said libel and pleaded as a c
plete defence the said provision to arbitrate; that as the said C
of Appeals has now reversed the said decision of the said Appel
Division, your petitioner is hereby filing its petition anew.

Wherefore, your petitioner prays that an order be made, comma
ing and directing said Atlantic Fruit Company to join
13 your petitioner in the arbitration of said dispute in accorda
with the terms of the charter-party pursuant to the Arbi
tion Law of New York, Chapter 275 of the Laws of 1920, and
such other and further relief as to the Court may seem just
proper. Bowring & Company, by Lowell L. Richards, Direc
Agent for Petitioner.

STATE OF NEW YORK,
County of New York, ss:

Lowell L. Richards, being duly sworn, deposes and says that he is a director of Bowring & Company, a domestic corporation; that he resides at 320 West 87th Street, New York City; that he has read the foregoing petition and knows the contents thereof and that the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true. Deponent further says that the ground of his belief as to all matters not stated upon knowledge, are reports received from the master of the Runa following his return to New York from St. Johns, and extracts from his log, and reports from the petitioner's agents made to deponent in the course of duty. That the reason this verification is not made by an officer of the Red Cross Line is that it is a foreign corporation and has no officer within the jurisdiction and all the material allegations are within the knowledge of the deponent. The reason that it is
14 made by deponent is that the agent of petitioner is a domestic corporation and deponent is a director therein. Lowell L. Richards.

Sworn to before me this 12th day of April, 1921. Reginald B. Williams, Notary Public, New York County.

Exhibit A to Petition.

Attach to Charter-Party No. 5978.

Bennett, Hvoslef & Co., 18 Broadway, New York.

Copy.

Division of Operations, United States Shipping Board Emergency Fleet Corporation, Room 422 Custom House, New York.

December 4, 1919.

Bennett, Hvoslef & Co., 18 Bway., N. Y. City:

Name of Vessel: Norwegian SS. Runa.

Approval is hereby granted for: one round trip within trading limits as specified on charter party under Charter Party
15 dated Nov. 28, 1919 for: ——.
Charterers: Red Cross Line.
We hold your guarantee that: ——. (Sgd.) Paul Foley, Chartering Executive. CHS.ML.

Exhibit B to Petition.

From Bowring & Company, New York.

March 16, 1920.

Messrs. Bennett, Hvoslef & Co., Agents for the S. S. Runa and Her Time Chartered Owners.

DEAR SIRS: You will recall that all charter hire paid to you subsequent to the deviation of the Runa to the Azores during the course of her voyage from this port to St. Johns, Newfoundland, commencing here 7 December, 1919, was paid to you under protest, in view of the fact that we were without means of determining at the time such charter hire was paid the facts regarding the deviation. We have now gone over the records in the case, including the abstract of log furnished us, and we feel there can be no question that the time lost by the vessel in proceeding to the Azores, in remain-
16 ing there and in returning thence to St. John's, should be for owners' account.

All of the circumstances we feel justify us in the belief that the Captain did not, as he was obliged to do under the charter-party, "prosecute his voyage with the utmost despatch." Had he done so he would have been in St. John's in advance of the storm that he claims drove him down to the Azores. It appears from his own version that he was only sixty miles off St. John's when the storm broke. In view of this fact it is plain that had he left this port at the time when he was ordered to leave he would have arrived safely at St. John's well in advance of the storm. The Runa was fully laden and ready to leave New York and the master was ordered to proceed in the early evening of Saturday, 6 December, 1919. The master refused to do so, however, stating that he desired to remain here until the next morning and went, as we understand, to the theater that night with his wife, who later accompanied him aboard the vessel for St. John's. As a result he did not get away until 9.30 the next morning. There was here at the outset of the voyage therefore an entirely needless delay of more than twelve hours, which time if employed pursuant to our orders in the prosecution of the voyage would have enabled him to reach St. John's, as above stated, without difficulty and well in advance of the storm.

Apart from the consideration just mentioned, we can find nothing in the circumstances disclosed by the log that could have justified the captain in turning the Runa's stern to the wind and proceeding out of his course to the Azores instead of continuing to head into the wind and attempting to cover the sixty remaining miles between his position and St. John's. Prudent seamanship could, we sup-
17 pose, have dictated no other course. It has been suggested that it was because of the presence on board his ship of his wife that the master pursued a contrary course and put around for the Azores. This fact may have accounted for the captain's strange behavior. Otherwise his action in our view is inexplicable. Whether

ıe foregoing be the real reason for the captain's behavior or not we re clearly convinced that there was nothing in the circumstances resent to justify the captain in proceeding on the charterer's time to ıe Azores and we have no doubt that after a full consideration of ıe facts you will agree with us.

We are therefore presenting to you our claim for overpaid charter re in the sum of $25,683.35, and for extra coal consumed over and ove the reasonable requirements of the voyage, if the deviation ıd not occurred, in the sum of $9,466, plus Horta disbursements $152.61, making a total of $35,256.96, all as per the enclosed emorandum.

Kindly favor us with an early remittance to cover the same, and lige, Yours very truly, Bowring & Company. (Sgd.) Chas. W. wring, Director.

Exhibit B-1 to Petition.

Atlantic Fruit Company.

New York City, March 19, 1920.

Subject: SS. "Runa."

ssrs. Bennett, Hvoslef & Co., 18 Broadway, New York, N. Y.

DEAR SIRS: We acknowledge receipt of your favor of the 17th stant, enclosing letter from Messrs. Bowring & Co., together with tement of claim against the SS. "Runa," amounting to 5,256.96.

After having given careful consideration to this claim, we have rived at the conclusion that we cannot assume any responsibility the matter, and you will please so advise Messrs. Bowring & mpany. Yours very truly (Sgd.) T. O. Muller, Vice-President. pies. KL 3-20-20.

Exhibit C to Petition.

From Bowring & Company, New York.

April 8th, 1920.

ssrs. Bennett, Hvoslef & Company, as Agents of the Atlantic Fruit Company.

SS. "Runa."

DEAR SIRS: Replying to your letters of the 20th and 31st ultimo, beg to state that in view of the refusal of your principal to ognize our claim for overpaid charter hire, coal, port charges, ., we shall have to proceed to enforce our rights under the charter- rty. We, therefore, hereby call upon your principals to join with in an arbitration of the dispute, as provided for in the charter-

party. We cannot, of course, pay the small balance of hire that you claim is still due you until the entire matter has been decided in arbitration or otherwise.

We await your advices as to how soon we can proceed to the arbitration of the matter. Yours very truly, Bowring & Company. (Sgd.) Chas. W. Bowring, Director.

20. **Exhibit D to Petition.**

Bennett, Hvoslef & Co., New York.

May 4, 1920.

Messrs. Bowring & Company, 17 Battery Place, City.

SS. "Runa."

GENTLEMEN: We enclose, for your perusal, copy of letter received from the Atlantic Fruit Company. Yours very truly (Sgd.) Bennett, Hvoslef & Co. Enclosure.

Exhibit E to Petition.

Atlantic Fruit Company.

New York City, May 1st, 1920.

Messrs. Bennett, Hvoslef & Company, No. 18 Broadway, New York City.

DEAR SIRS: We have considered carefully Messrs. Bowring & Company's letter with reference to the dispute which has arisen on the S. S. Runa and have decided not to arbitrate, but that if
21 Messrs. Bokring & Company believe they have a case we prefer to have the matter settled in a legal manner, in order that the owners may be called into the case. Yours very truly (Sgd.) T. O. Muller, Vice-President. Copied. KL-5-4-20.

Exhibit F to Petition.

From Bowring & Company, New York.

May 10, 1920.

Messrs. Bennett, Hvoslef & Co., 18 Broadway, New York City.

DEAR SIRS: We duly received your letter of the 4*st* inst., enclosing a copy of the letter received by you from T. U. Muller, Vice-President of the Atlantic Fruit Company, under date of the 1st inst.

We note that the Atlantic Fruit Company takes the position that it will not arbitrate this controversy. We are, therefore, pointing out to you, as their agents, that Clause 23 of the Charter Party requires them to join in an arbitration. We quote extract from the clauses in question:

"That should any dispute arise between Owners and Charterers the matters in dispute shall be referred to three persons ew York, one to be appointed by each of the parties hereto, and third by the two so chosen; their decision, or that of any two em, shall be final and for the purpose of enforcing any award, agreement may be made a rule of court. * * *

e, therefore, hereby notify you that we recognize no right whatr in the Atlantic Fruit Company to refuse to arbitrate in acnce with the terms of the Charter Party and we hereby notify that we have chosen Mr. Richard D. Wrigley to act as our artor in the arbitration and he has signified his willingness to t such appointment.

e call upon the Atlantic Fruit Company now to appoint its artor in order that he and ours may meet and choose the third in dance with the terms of the Charter.

ndly notify us at your earliest convenience of the name of the rator chosen by the Atlantic Fruit Company. Very truly yours, Cross Line, Bowring & Company, (Sgd.) Chas. W. Bowring, Dir, as Agents.

Exhibit G to Petition.

Bennett, Hvoslef & Co.

New York, May 14, 1920.

s. Bowring & Company, 17 Battery Place, New York City.

NTLEMEN:

Ss. "Runa."

further references to your letter of May 10th, we now beg to se copy of communication received this morning from the At- Fruit Company, the contents of which explains itself. Yours truly, (Sgd.) Bennett, Hvoslef & Co. Enclosure.

Exhibit H to Petition.

Atlantic Fruit Company.

New York, May 13, 1920.

ett, Hvoslef & Co., 18 Broadway, New York City.

AR SIRS:

Ss. "Runa."

are in receipt of your favor of the 11th inst. enclosing copy of letter from Bowring & Co., which we have carefully read.

As already advised you, we do not feel that we could arbitrate this matter as it concerns the Owners of the steamer and urselves. We, of course, regret exceedingly that the voyage d so disastrous to our friends, Bowring & Co. Very truly yours,) T. O. Muller, Vice-President.

Affidavit of Vincent J. Di Bello.

[Title omitted.]

STATE OF NEW YORK,
County of New York, ss:

Vincent J. Di Bello, being duly sworn, says that he is a clerk in the office of Loomis, Barrett & Jones, attorneys for the petitioner herein; and that on the 13th day of April, 1921, at No. 61 Broadway, Borough of Manhattan, City of New York, deponent being then more than twenty-one years of age, he served the annexed notice and
25 petition personally on the above named Atlantic Fruit Company by delivering copies thereof to Henry B. Mendenhall personally and leaving the same with him, and that he knew said Henry B. Mendenhall to be at that time the Secretary of the said Atlantic Fruit Company and knew the corporation so served to be the company mentioned and described in the said notice and petition as the respondent in this proceeding and the person to be served. Vincent J. Di Bello.

Sworn to before me this 13th day of April, 1921. Reginald B. Williams, Notary Public, etc. [Seal.]

Answer to Petition.

[Title omitted.]

The answer of Atlantic Fruit Company to the petition of Red Cross Line respectfully shows and alleges as follows:

26 First. It admits the allegations set forth in paragraph marked "First" of the petition herein.

Second. It admits that at the times stated in the petition, Bowring & Company was the agent of the petitioner, but denies any knowledge or information sufficient to form a belief as to the other allegations set forth in paragraph marked "Second" of the petition herein.

Third. It admits that at the times stated it was and is a foreign corporation doing business in New York and was the chartered owner of the Norwegian Steamship "Runa," but, except as admitted, it denies the allegations set forth in paragraph marked "Third" of the petition herein.

Fourth. It admits that the petitioner and it entered into a charter party for the steamship "Runa" dated on or about November 28, 1919, but for greater certainty as to the terms of said charter party, it begs leave to refer to the original thereof.

Fifth. It admits that the sections of the charter party set forth in paragraph "Fifth" of the petition are correct in substance, but for a greater certainty, begs leave to refer to the original of said charter party.

Sixth. It admits that the clauses of the said charter party set forth

paragraph "Sixth" of the petition are substantially correctly
ted, but for greater certainty, begs leave to refer to the original of
charter party.

eventh. It admits the allegations set forth in paragraph marked
"Seventh" of the petition herein.

Eighth. It denies any knowledge or information sufficient
to form a belief as to the matters set forth in paragraph
rked "Eighth" of the petition herein and therefore denies the
e, and further alleges that the pilot, who was appointed by the
tage authorities in the port of New York, and whose employment
compulsory by law, refused to take the Steamship "Runa" out
ea on the evening of December 6, 1919, on the ground that it
not safe to do so. It further alleges that whatever communica-
s took place between the petitioner and the master of the "Runa"
e directly with the master and not with him through Atlantic
it Company.

Ninth. It denies any knowledge or information sufficient to form
elief as to the allegations set forth in paragraph marked "Ninth"
he petition herein, and therefore denies the same.

Tenth. It denies the allegations set forth in paragraph marked
enth" of the petition herein, except that it admits and alleges
t the petitioner demanded payment of its alleged damages from
antic Fruit Company and that said payment was refused.

Eleventh. It admits and alleges that it sent to the petitioner a let-
of which Exhibit B-1 attached to the petition is apparently a
y, but begs leave to refer to the original; that it has refused to
the sum demanded by the petitioner and has denied and dis-
ed the facts and denied and disputed its liability, but, except as
nitted, it denies the allegations set forth in paragraph marked
"Eleventh" of the petition herein.

Twelfth. It admits the allegations set forth in paragraph
"Twelfth" of the petition.

Thirteenth. It admits that the letter referred to in paragraph
hirteenth" of the petition was sent to Messrs. Bennett, Hv-slef &
mpany, but for certainty as to its contents, begs leave to refer to
original. It denies that said Bennett, Hvoslef & Company were
are its agents.

Fourteenth. It admits that thereafter it wrote a letter to Messrs.
nnett, Hvoslef & Company, of which Exhibit E, attached to the
ition herein apparently is a correct copy, but for certainty, begs
ve to refer to the original thereof. It denies that Bennett, Hvoslef
Company were or are its agents, as set forth in paragraph marked
ourteenth" of the petition herein.

Fifteenth. It admits that a letter, of which Exhibit F, attached
the petition is apparently a copy, was sent to Bennett, Hvoslef
Company, but for greater certainty begs leave to refer to the orig-
l thereof. It denies that Bennett, Hvoslef & Company were or
its agents.

Sixteenth. It admits the allegations set forth in paragraph marked
ixteenth" of the petition except that it begs leave to refer to the
ginals of the letters referred to in said paragraph, for certainty as
their contents.

Seventeenth. It admits and alleges that it has refused to arbitrate said dispute and controversy, the reasons for its refusal being more fully set forth in separate and distinct defense herein.

29 Eighteenth. It denies the allegations set forth in paragraph marked "Eighteenth" of the petition herein.

Nineteenth. It admits the allegations set forth in paragraph marked "Nineteenth" of the petition herein, except that it denies any knowledge or information sufficient to form a belief as to whether or not said petition was filed.

Further answering the petition herein and for a further separate and distinct defense thereto Atlantic Fruit Company alleges as follows:

Twentieth. It denies each and every allegation set forth in the petition herein, except as hereinbefore expressly admitted.

Twenty-first. That the dispute or controversy between the parties hereto, set forth in the petition and answer, being one arising out of a charter party, is a maritime dispute and is a cause of "Admiralty and Maritime Jurisdiction" over which causes the Courts of the United States, pursuant to Article III, Section 2 of the Constitution of the United States, and Sections 24 and 256 of the Judicial Code, are given exclusive jurisdiction, saving to suitors only the right of common law remedies where the common law is competent to give them.

Section II of Article III of the Constitution of the United States reads in part as follows:

"The judicial power shall extend * * * to all cases of admiralty and maritime jurisdiction."

30 Judicial Code, Section 24, as amended, U. S. Comp. Stat. Par. 991, provides as follows:

"The district courts shall have original jurisdiction as follows: * * * (3) Of all civil causes of admiralty and maritime jurisdiction saving to suitors in all cases the right of common law remedy where the common law is competent to give it and to claimants the right and remedies under the Workmen's Compensation Law of any state."

Section 256 of the Judicial Code, U. S. Comp. Stat., provides as follows:

"The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the Courts of the several states; * * *"

That the New York Statute, entitled "An Act in Relation to Arbitration, Constituting Chapter 72 of the Consolidated Laws," being Chapter 275 of the Laws of 1920 of the State of New York, provides an additional remedy unknown to the common law, for the settlement or adjustment of disputes by compelling parties to arbitrate them, if they have agreed to do so. Such a remedy is not applicable to disputes within the Admiralty and Maritime Jurisdiction of the United States Courts. If the said Statute of the State of New York is designed to cover controversies of a maritime nature such as the one set up in the petition herein, which are within the Admiralty

and Maritime jurisdiction, it is contrary, in that respect, to the Constitution of the United States and the said laws of the United States enacted pursuant to the Constitution.

iat the respondent herein, on June 4, 1920, filed a libel against petitioner in the United States District Court, for the Southern ict of New York, claiming a balance of charter hire due under charter party amounting to $4,518.98, and process therein was d on the petitioner herein on June 5, 1920. That the peti- r herein has already appeared in that action and filed its answer. venty-second. That the respondent herein was not the owner of teamship "Runa," but the time charterer thereof under a charter practically identical with the charter party between the parties n. Under said charter party the entire navigation of the Steam- "Runa" was under the control of the master, officers and crew inted and employed by the Norwegian owner of said Steamship, Waage and not by the respondent herein, and if there was any or neglect on the part of the master of the said steamer in re- to her clearing, sailing navigation, choice of course or otherwise, s the fault and neglect of her Norwegian owner who was not a ent of the State of New York.

iat under the law and practice of the United States District ts in Admiralty, particularly Rule 56 of the United States Su- e Court in Admiralty and Rule 18 of the United States District t for the Southern District of New York a remedy is given to a ndant or respondent against whom a suit is instituted in the Ad- lty Court whereby he may bring in on petition the party claimed ultimately liable or responsible for the fault, neglect or breach ntract upon which the suit is brought. In case the party sought to be brought in is a non-resident, a foreign attachment may be issued against his property within the jurisdiction and his appearance enforced in that manner.

he proper tribunal for the hearing of the dispute between these es arising out of the said charter party is the United States Dis- Court for the Southern District of New York in which the claims e sub-charter, charterer and owner of the Steamship "Runa" can ll heard in one action and their respective rights finally deter- ed.

Therefore, the respondent prays that the petition herein be dis- ed with costs, and that the relief demanded by the petitioner be ed, on the ground that the Arbitration Law of New York, Chap- 75 of the Laws of 1920 is not intended to apply to disputes within Admiralty and Maritime jurisdiction of the United States Courts, as the one set up in the petition and answer herein, and on the nd that, if intended to so apply, the said Arbitration Law of the e of New York is repugnant to Article III, Section 2 of the Con- tion of the United States; to Section 24 of the Judicial Code of United States, Subdivision Third, and to Section 256 of the icial Code of the United States, Subdivision Third. Hunt, Hill & s, Attorneys for Respondent, Atlantic Fruit Company, 120 Broad- , Borough of Manhattan, New York City.

33 STATE OF NEW YORK,
County of New York, ss:

T. O. Muller, being duly sworn, deposes and says: That he is the President of Atlantic Fruit Company, the respondent herein, that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

Deponent further says that the reason why this verification is not made by the respondent but is made by the deponent is that the respondent is a foreign corporation.

The sources of the deponent's information and the grounds of his belief as to all matters therein stated to be alleged upon information and belief are as follows: The charter party, records and correspondence in deponent's possession and information obtained by deponent as an officer of the respondent, Atlantic Fruit Company. T. O. Muller.

Sworn to before me, this 6th day of July, 1921. W. E. Hardin, Notary Public, Kings County, No. 311. Kings County Register's No. 3059. Certificate filed in New York County No. 43. New York County Register's No. 3015. My commission expires March 30th, 1923. (Seal.)

34 **Affidavit of T. O. Muller.**

[Title omitted.]

STATE OF NEW YORK,
County of New York, ss:

T. O. Muller, being duly sworn, deposes and says: I am the President of Atlantic Fruit Company, the respondent herein, which is a corporation organized and existing under the laws of the State of Delaware, and has an office at No. 17 Battery Place, Borough of Manhattan, City, County and State of New York.

The deponent denies that there is any sum whatever due to the petitioner herein, but on the contrary the petitioner owes to the respondent the sum of $4,518.99 balance due for coal, removal of fruit fittings and charter hire, under the said charter party referred to in the petition herein, for which sum the respondent has commenced an action against the petitioner in the United States District Court, for the Southern District of New York, in which action the petitioner has appeared and filed its answer.

That the deponent has been advised by counsel for the respondent, Messrs. Hunt, Hill & Betts of No. 120 Broadway, Borough of Manhattan, New York City, that in their opinion the Arbitration
35 Law of New York, Chapter 275 of the Laws of 1920, which gives a remedy for the adjustment of controversies by compelling the parties to carry out any arbitration agreements which they may have entered into, does not apply to the dispute between

the petitioner and the respondent herein which has arisen out of said charter party, because this dispute is of a maritime nature, and consequently within the Admiralty and Maritime jurisdiction of the United States Courts, except insofar as common law remedies are saved to suitors by Section 24 of the Judicial Code, and that if the said New York Statute is intended to apply to disputes within the Admiralty and Maritime Jurisdiction of the United States Courts, such as the one set forth in the petition and answer herein, it is contrary to the Constitution of the United States, Article III, Section 2, and to Section 24 of the Judicial Code of the United States, Subdivision Third, and to Section 256 of the Judicial Code of the United States, Subdivision Third.

Wherefore, the deponent, on behalf of the respondent, requests that the petition herein be dismissed with costs, and that the relief asked for therein be denied. T. O. Muller.

Sworn to before me this 6th day of July, 1921. W. E. Hardin, Notary Public, Kings County, No. 311. (Seal.) Kings County Register's No. 3059. Certificate filed in New York County No. 46. New York County Register's No. 3015. My Commission Expires March 30, 1923.

36 **Affidavit of John W. Crandall.**

[Title omitted.]

STATE OF NEW YORK,
County of New York, ss:

John W. Crandall, being duly sworn, deposes and says:

I am a member of the firm of Hunt, Hill & Betts of No. 120 Broadway, Borough of Manhattan, New York City, attorneys for the respondent herein, Atlantic Fruit Company, and have charge of this action, and am familiar with the facts thereof.

The deponent has advised the respondent herein, through its president, Mr. T. O. Muller, that in the opinion of the deponent the Arbitration Law of the State of New York, being Chapter 275 of the Laws of 1920, does not apply to a dispute of a maritime nature, within the Admiralty and Maritime jurisdiction of the United States Courts, such as the one set forth in the petition and answer herein, which arises out of a charter party of the Norwegian Steamship "Runa."

Deponent has further advised the respondent that in the deponent's opinion if the said Act of the New York State Legis-
37 lature is intended to apply to disputes of the nature already indicated, it is repugnant in that respect to Article III, Section 2 of the Constitution of the United States, providing that the judicial power shall extend to all cases of Admiralty and Maritime jurisdiction and to Section 24 of the Judicial Code of the Courts of the several States, except where a Federal Court's original jurisdiction of all civil causes of Admiralty and Maritime jurisdiction, sav-

ing to suitors in all cases the right of a common law remedy, where the common law is competent to give it, and to Section 256 of the Judicial Code of the United States, Subdivision Third, providing that the jurisdiction vested in the Courts of the United States in causes of Admiralty and Maritime jurisdiction shall be exclusive of the Courts of the several States, except where a common law remedy is saved to suitors, because the said Statute provides an additional remedy for the adjustment of controversies between parties, not known to the common law, and hence not saved to suitors by the aforesaid saving clause.

Wherefore, deponent requests that the petition herein be dismissed with costs, and that the relief asked for by the petitioner be denied. John W. Crandall.

Sworn to before me this 1st day of July, 1921. Edna Rapallo, Notary Public, New York County No. 286. Certificate filed in Register's Office, N. Y. County No. 2235.

38 Supreme Court, New York County.

[Title omitted.]

Notice of Intention to Remove.

SIRS: Please take notice, that on April 20, 1921, we shall file in the office of the Clerk of the New York Supreme Court, New York County, the petition and bond hereto annexed, for the removal of the above entitled cause to the District Court of the United States for the Southern District of New York, and that we shall proceed to file the record herein according to the United States Statute in such cases made and provided.

Dated, New York, April 19, 1921. Yours, etc., Hunt, Hill & Betts, Attorneys for Atlantic Fruit Company, appearing specially herein. Office and Post Office Address, 120 Broadway, Borough of Manhattan, New York City.

To Messrs. Loomis, Barrett & Jones, Attorneys for Petitioner, 52 Broadway, New York City.

39 **Petition for Removal.**

[Title omitted.]

To the Supreme Court of the State of New York in and for the County of New York:

The petition of Atlantic Fruit Company of No. 61 Broadway, Borough of Manhattan, New York City, appearing specially herein, by Hunt, Hill & Betts, its attorneys, alleges and respectfully shows as follows:

First. That the above entitled action has been brought in the Supreme Court of the State of New York, in and for the County of New York and is now pending therein.

Second. That the Red Cross Line, the petitioner in the said action, is, as your petitioner is informed and believes, a foreign corporation duly organized and existing under the laws of the United Kingdom of Great Britain and Ireland, and represented in the Port of New York by an agent at No. 17 Battery Place, Borough of Manhattan, New York City, New York.

40 Third. That your petitioner is the sole party against which relief is demanded in the aforesaid action.

Fourth. That your petitioner is, and at all the times hereinafter mentioned, was a corporation duly organized and existing under the laws of the State of Delaware, with an office at No. 61 Broadway, Borough of Manhattan, City, county and State of New York.

Fifth. That the matter in dispute in this action as between Red Cross Line and your petitioner, Atlantic Fruit Company, exceeds the sum of Three Thousand Dollars ($3,000) exclusive of interest and costs.

Sixth. That this is a suit of a civil nature, at law or in equity, and has been brought in the Supreme Court of the State of New York, New York County. That a petition was served on your petitioner on April 13, 1921, returnable at Special Term, Part I, of the Supreme Court, New York County, praying that an order be made commanding and directing your petitioner to join with the petitioner therein in the arbitration of a dispute between said parties arising out of a time charter party on the Norwegian steamship Runa, entered into between them November 28, 1919, pursuant to an arbitration clause in said charter party, said action being begun against your petitioner under the provisions of the Arbitration Law of New York, Chapter 275 of the Laws of 1920. That a copy of said petition, omitting for the sake of brevity, the exhibits thereto attached, is hereto annexed and marked Exhibit A.

41 Seventh. That said petition hereto annexed sets forth a written charter party between Atlantic Fruit Company and Red Cross Line, dated November 28, 1919, whereby the Atlantic Fruit Company, as chartered owner of the Norwegian steamship Runa agreed to let said vessel to Red Cross Line and the Red Cross Line agreed to hire same for one round trip between any safe port and/or ports in Canada and/or other British possessions not north of the River St. Lawrence and/or the United States for the consideration of Twenty-five Thousand Dollars ($25,000) per month. The petition further alleges that the master of the steamship Runa did not prosecute the voyage from the Port of New York with the utmost despatch; that instead of sailing on the evening of December 6, 1919, he sailed on the morning of December 7, 1919. The petition further alleges that when within approximately one hundred miles of destination, namely St. Johns, Newfoundland, the master turned the Runa about and proceeded to the Azores, about thirteen hundred miles distant from St. Johns, where the master kept said vessel for twenty-one days, at the same time taking on an excess supply of coal which was not reasonably required and that the trip from New York to St. Johns consumed thirty-nine days instead of the usual time of eight days. The petition alleges that the Red Cross Line,

in order to prevent the withdrawal of the Runa from its service, paid under protest to Atlantic Fruit Company, the charter hire stipulated in said charter party, including cost of fuel and other disbursements,

and that the Red Cross Line was ignorant of the true facts
42 and that therefore it became entitled to the return of the sum of Thirty-five thousand two hundred fifty-six and 96/100 Dollars ($35,256.96), overpaid charter hire and disbursements. The petition alleges a demand upon your petitioner for the repayment of said sum and the refusal of your petitioner to pay same, and also a demand by Red Cross Line upon your petitioner for an arbitration of the dispute according to the charter party, and the refusal of your petitioner to arbitrate same and concludes with a prayer for an order directing your petitioner to arbitrate said dispute. That said petition is now on file with the Clerk of Special Term, Part I, of the New York Supreme Court, New York County.

Eighth. That the only parties in the State Court suit of Red Cross Line are said Red Cross Line and your petitioner, Atlantic Fruit Company.

Ninth. That this action was commenced by the service on Atlantic Fruit Company, on April 13, 1921, of a copy of the petition hereinbefore referred to. This petition is returnable on April 21, 1921, at 10:15 o'clock A. M. at Special Term, Part I, New York Supreme Court, New York County. That your petitioner has not yet made any answer to the petition, declaration or complaint of said Red Cross Line, and the time to so answer does not expire until the return thereof on April 21, 1921.

Tenth. That this suit of Red Cross Line arises under the Constitution or laws of the United States, because it is one of admiralty and maritime jurisdiction over which the Federal Courts are given original jurisdiction by the Constitution and the Judicial Code.

43 Eleventh. That the controversy in said suit is moreover one wholly between a citizen of a State and a foreign citizen or subject.

Twelfth. That your petitioner offers herewith a bond with good and sufficient surety for its entering in the District Court of the United States for the Southern District of New York, within thirty days from the date of the filing of this petition, a copy of the record of this suit and all pleadings and processes herein and also paying all costs which may be awarded by said District Court if said Court shall hold that the suit was wrongfully and improperly removed thereto.

Thirteenth. Your petitioner has not made any previous applications for the removal of this cause to any court or judge.

Wherefore, your petitioner prays that the said bond herewith submitted, be accepted and approved and that this suit may be removed to the District Court of the United States in and for the Southern District of New York, pursuant to the laws of the United States and that no further proceedings be had herein in this Court.

Dated April 19, 1921. Atlantic Fruit Company, by Allan H. Richardson, Vice-President, Petitioner. (Corporate Seal.) Hunt, Hill & Betts, Attorneys for Petitioner, appearing specially.

44 STATE OF NEW YORK,
County of New York, ss:

Allan H. Richardson, being duly sworn, deposes and says that he is the Vice-President of Atlantic Fruit Company, the petitioner named in the foregoing petition and that he has read said petition and knows the contents thereof and that the same is true to the knowledge of deponent except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true. That the reasons why this verification is made by deponent and not by petitioner is because the petitioner is a corporation and the deponent is the Vice-President thereof.

That the sources of deponent's information and the grounds of his belief as to the matters therein stated to be alleged upon information and belief are information derived by the deponent in his capacity as an officer of the petitioner, and statements in the verified petition of Red Cross Line. Allan H. Richardson.

Sworn to before me this 19th day of April, 1921. Estelle G. Stich, Notary Public, Bronx Co. (Seal.) Bronx Co. Clerk's No. 72. Bronx Co. Reg. No. 23. Cert. filed in N. Y. Co. N. Y. Co. Clerk's No. 171, Reg. No. 3224. Com. Expires March 30, 1923.

45–53 **"Exhibit A" to Petition for Removal.**

[Omitted; printed p. 5.]

54 **Bond on Removal.**

Know all men by these presents: That we, Atlantic Fruit Company, a corporation of the State of Delaware, with an office at 61 Broadway, New York City, as Principal, and the United States Fidelity and Guaranty Company, having an office and usual place of business at No. 47 Cedar Street, in the City of New York, County and State of New York, as Surety, are held and firmly bound unto Red Cross Line in the sum of five hundred ($500.00) dollars for the payment whereof, well and truly to be made unto the said Red Cross Line, its successors and assigns, we bind ourselves, and each of our successors and assigns, jointly and severally firmly by these presents.

Upon these conditions, the said Atlantic Fruit Company
55 having petitioned the Supreme Court of the State of New York, held in and for the County of New York, for the removal of a certain cause therein pending, wherein the said Red Cross Line is petitioner and the said Atlantic Fruit Company is defendant, to the District Court of the United States, for the Southern District of New York.

Now, if the said Atlantic Fruit Company shall enter into said District Court of the United States, within thirty (30) days from the date of the filing of said petition a certified copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said District Court of the United States if the said Court

shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void, otherwise to remain in full force and virtue.

In witness whereof, we have hereunto set our hands and seals this 19th day of April, 1921. Atlantic Fruit Company, by Allan H. Richardson, Vice President. (L. S.) United States Fidelity and Guaranty Company, by S. Frank Hedges, Attorney-in-fact. Attest: William H. Estwick, Attorney-in-fact. (Corporate Seal.)

(Acknowledgment by Atlantic Fruit Company and United States Fidelity and Guaranty Company.)

56 **Order Remanding Cause.**

At a Stated Term of the United States District Court for the Southern District of New York, held in the Court House in the Post Office Building in the Borough of Manhattan on the 27th day of June, 1921.

Present—Hon. Augustus N. Hand, District Judge.

In the Matter of the Petition of RED CROSS LINE for an Order Directing Atlantic Fruit Company to Proceed to Arbitration.

Petitioner's motion to remand having been heard and submitted to the Court for consideration, and the same having been fully considered, and the opinion of the Court having been delivered, it is, in accordance with said opinion,

Ordered that said motion be and the same is granted, and that this cause be and the same is remanded to the Supreme Court, Special Term, Part I, thereof, New York County, State of New York, for further proceedings. Augustus N. Hand, U. S. D. J.

57 & 58 **Opinion of Mr. Justice Burr.**

Matter of Red Cross Line.—This motion for an order directing Atlantic Fruit Company to proceed to arbitration in accordance with its agreement and pursuant to Chapter 275 of the laws of 1920 is granted, with $10 costs (see Matter of Nerkowitz, 230 N. Y., 261; Matter of Division, &c., 132 A. D., Third Dep't, Law Journal, May 27, 1921, 196 A. D., 206; Yeanerakopoulous, Law Journal, April 21, 1921, Gavegan, J.; People's Ferry Co. vs. Beers et al., 61 U. S., 393, 402; Sheppard vs. Steele, 43 N. Y., 52; Brockman vs. Hamill, 43 N. Y., 554, 558; In re The Ada, 250 Fed. Rep., 194-196; Matter of Red Cross Line, U. S. Dist. Ct., June 20, 1921, A. N. Hand, D. J.).

Stipulation Waiving Certification.

Pursuant to Section 3301 of the Code of Civil Procedure, it is hereby stipulated that the papers as hereinbefore printed consist of true and correct copies of the notice of appeal, the order appealed

m, and all the papers upon which the Court below acted in king the order appealed from, and the whole thereof, now on in the office of the Clerk of the County of New York.
Certification thereof, in pursuance of Section 1353 of the Code Civil Procedure is hereby waived.
Dated, August 30th, 1921. Hunt, Hill & Betts, Attorneys for antic Fruit Company-Appellant. Loomis, Barrett & Jones, Atneys for Petitioner-Respondent.

(Exhibit A Attached to Petition.)

Atlantic Fruit Company,

General Offices,

61 Broadway, New York City.

Fruit Time Charter.

Bennett, Hvoslef & Co.,

Steamship Agents & Ship Brokers,

18 Broadway, New York.

All commercial codes used.
Cable address: "Benvosco."

This charter party, made and concluded upon in the City of w York, the Twenty-eighth day of November, 1919, between Attic Fruit Co., Chartered Owners of the good steel Screw Steamp "Runa" of Christiania Cubic Capacity —, having accommodas for — Passengers (about 1,900 tons, Estimated Dead Weight acity) 1,611 tons gross register, having engines of 304 nominal se power, provided with proper certificates for hull and machin- and classed 1 A 1 Norwegian Veritas and the [Atlantic Fruit Red Cross Line,
]* ∧ with its general offices at New York, U. S. A.

Delivery:

Witnesseth, That the said Owners agree to let, and the said Charers agree to hire the said steamship from the time of delivery Philadelphia, Pa., with sufficient bunkers to take her to New York for a period of [months]* one (1) round trip —— she being on her delivery as above — ready to receive cargo, and being tight, staunch, strong and in every way fitted for the rice, having water ballast, steam winches and donkey boiler, h capacity to run all the steam winches at one and the same e, including necessary dunnage, with full complement of ofrs, seamen, engineers and firemen for a vessel of her tonnage to employed in carrying lawful merchandise including petroleum

*Matter enclosed in brackets erased in copy.]

or its products, in cases, and passengers so far as accommodations will allow, but any expense to suit U. S. passenger inspection to be borne by Charterers, between any safe port and/or ports in Canada and/or other British possessions not north of the River St. Lawrence (steamer to leave the St. Lawrence by the 31st of October) [and/or Europe (excluding the White Sea, Black Sea and Baltic in Winter)]* and/or the United States of America and/or West Indies and Gulf of Mexico and/or Caribbean Sea, and/or Central America (Magdalena River excluded) and/or South America, not South of the River Plate, as the Charterers or their Agent shall direct, on the following conditions:

Owners.

Wages, Provisions, Insurance:

1. Shall provide and pay for all provisions, wages, and consular shipping and discharging fees of Captain, Officers, Engineers, Firemen and Crew; shall pay for the insurance of the vessel, also for all engine room and deck stores, and maintain her in a thoroughly efficient state in hull and machinery for and during the services, guaranteeing to maintain the boilers in a condition to bear
61 a working pressure of at least within 20 pounds of what is allowed by Lloyds or Veritas (and the pressure to be carried continuously at sea) during the whole term of this charter, and, to victual and provide for all passengers in the best manner according to their class.

Default:

2. In default of payment of hire, the Owners shall have the faculty of withdrawing the said steamer from the service of the Charterers without prejudice to any claim they, the Owners, may have on the Charterers in pursuance of this charter.

Loss of Time:

3. That in the event of loss of time from deficiency of men or stores, breakdown of machinery or damage preventing the working of the steamer for more than twenty-four hours at sea, the payment of hire shall cease until she be again in an efficient state to resume her service, re-delivered at place of accident or allowance therefor, and should she in consequence put into any port other than that to which she is bound, the port charges and pilotages at such port shall be borne by steamer's Owners. Also if any loss of time from crew or stores not being on board in time, or from repairs to hull and machinery, which are for Owners' account, not being complete after cargo and coals are on board and hour of sailing has been fixed by Charters and notice given to Captain, the time is lost to the Owners' account.

[*Matter enclosed in brackets erased in copy.]

[Painting:

In the event of the steamer being chartered for a period of e months or longer, the hull and funnel to be painted such color harterers direct, the expense of painting to be borne by Owners, ter-s to furnish paint for funnel. Ship's bottom to be kept prop- cleaned and steamer to be docked whenever Captain or Charterers think it necessary, but at least once in every four months. And ment of hire to be suspended until she is again in proper state ervice.]*

Fruit Decks:

That the steamer shall be provided by the Owners with mary "tween" and orlop fruit decks strong enough to sustain eight when filled with bananas, other fruits or general cargo.

Ventilation:

Steamer to work night and day if required by Charterers, and eam winches to be at Charterers' disposal during loading and arging. Owners to provide men to work winches both day and t as required below. Charterers agreeing to pay for all such t work incurred at the current local rate. That the steamer be ded with awnings covering the entire deck during the whole of charter, also with wind sails for each hatch, besides stationary lators placed at convenient places throughout the deck as terers may direct. That the crew is not allowed under any mstances to carry bananas or other merchandise for their own account. Donkey boiler not to be worked when carrying bananas. That should the steamer have an iron deck, the Owners shall agree to have the same sheathed all through 2½-inch plank, or otherwise, Charterers to do it at Owners' nse.

Charterers.

Rate:

Shall pay and provide for all the coal, port charges, pilotages, ies and commissions.

Shall pay for the use of said vessel ($25,000.00) twenty-five sand and 00/100 Dollars in U. S. Currency per calendar month, mencing from the time [the ship is entered at the Custom House placed with clear holds at the Charterers' disposal]* and at and the same rates for any part of a month, hire to continue from me specified for terminating the charter until her delivery to ers (unless lost) — [at a port in the United States.]* New , in like good order and condition, ordinary wear and tear ted.

*[Matter enclosed in brackets erased in copy.]

Minnesota ... St. Paul, Minn.

Payment of said hire to be made in Cash in New York, half monthly in advance from the date of delivery of steamer. [If Charterers keep steamer — months, rate to be — per month for whole period.]*

Disbursements:

9. Cash for ship's necessary disbursements, if desired by Master, but not exceeding $1,500 monthly, to be supplied by Charterers to the Captain at current rate of exchange, subject to commission of 2½ per cent to cover all charges, and Captain's receipt to be
64 taken as part payment of the Charter. That should the steamer be on her voyage towards the port of return delivery at the time a payment of hire comes due, said payment shall be made for such length of time as Owners, Agents, and Charterers, or their agents, may agree upon as the estimated time necessary to complete voyage, and when the steamer is delivered to Owners' Agent, any difference shall be refunded by steamer or paid by Charterers, as the case may require.

Cargo:

10. That the cargo or cargoes shall be laden or discharged with the assistance of the steamer's crew and tackle, in any dock or at any wharf or place that the Charterers or their Agents may direct, provide- the steamer can always safety lie afloat at all times of tide. That the whole reach of the steamer's holds, decks and all places of loading and passenger accommodation of the steamer (not being more than she can reasonably carry and stow) and be at the Charterers' disposal, reserving only proper and sufficient space for ship's officers, crew, tackle, provisions, stores and fuel.

Captain:

11. That the Captain shall prosecute his voyage with the utmost dispatch, and take every advantage of wind by using the sails with a view to economize fuel, and shall render all possible assistance with ship's crew and boats. That the Captain, although appointed by the Owners, shall be under the orders and direction of the Charterers as regards employment, agency or other arrangements; and the Charterers hereby agree to indemnify the Owners from all
65 consequences or liabilities that may arise from the Captain signing bills of lading or otherwise complying with their orders and directions. That if the Charterers shall have reason to be dissatisfied with the conduct of the Captain, officers or engineers, they shall make such complaint in writing to an agent in New York specially appointed by Owners, who shall have full power to act on their behalf and, if necessary, dismiss any of the officers should they find the complaints made by the Charterers are justified and proven. The Captain will report at Charterers' office at least once a day when in port. The Captain shall be furnished from time to

[*Matter enclosed in brackets erased in copy.]

me with all requisite instructions and sailing directions, and shall eep a full and correct log of voyage or voyages, and shall im- ediately on arrival in port deposit with the Charterers' Manager r Agents a full and complete abstract of steamer's log, together with ich information appertaining to voyage or voyages of the ship as harterers may require. Blank for such report to be furnished by e Charterers. Charterers to furnish Captain and chief officers with dges for their caps, and same to be worn while they are entering leaving port, or while in port on ship's duty.

Super-Cargo:

12. That the Charterers shall have permission to appoint a super- rgo to see that voyages are prosecuted with the utmost dispatch; e crew will follow his directions and instructions in putting on d taking off hatches, or otherwise carrying out his instructions respecting the care of fruit. He shall be furnished, free of charge, with first class fare and accommodations.

Options:

13. That the Charterers shall have the option of continuing this arter for a further period of One (1) round trip on giving notice ereof to the Owners or their Agents [fifteen (15) days previous to e expiration of named term,]* immediately the steamer sails from Johns on first trip.

14. Should the vessel be driven into port or to anchorage by stress weather or from any accident to the cargo, such detention or loss time shall be at the Charterer's expense.

Quarantine:

[15. In case Gulf or Caribbean ports should quarantine steamers om United States ports, or in case the United States should arantine steamers from ports in the Gulf or Caribbean Sea, arterers to have the option of cancelling this Charter Party on ing Owners or Agents fifteen (15) days' notice of such intention days' observation in port in Cuba not to count as quarantine.]* at on account of the perishable nature of the cargoes that this amer is intended to carry, she is not allowed to assist, or tow any sel, when by so doing she is liable to be detained, only in order save human life. (Exception:—In the event of break-down of a sel of the Atlantic Fruit Co., and another vessel employed by same arterers being within signaling distance, masters will confer and as conditions merit.) But should any towage or salvage be earned on other ships, it is to be divided between Owners and Charterers equally, after deducting any expense such as broken tow ropes, bits, or lost time, coal, or any item sacrificed such act.

*Matter enclosed in brackets erased in copy.]

[Hurricane:

16. In the event of hurricane destroying the fruit at any of the sources of supply in the West Indies and/or Mexico Central America and/or South Amreica, Charterers to have the option of cancelling this chater by giving Owners one mnth's notice, or paying one month's hire.]*

Passengers:

17. Charterers shall pay at the rate of $4.00 per day for each first class passenger, and at the rate of 75¢ per day for pilots, tallymen, customs officials, etc.

General Conditions.

Coal:

18. Charterers shall accept and pay for all the coal in steamer's bunkers on delivery, at the current market price per ton of 2,240 lbs.; and steamer to have sufficient coal, in bunkers on delivery, to take her to New York [or Boston, besides two days' extra coal, in bunkers, for coasting purposes;]* and Owners to pay for all coal left in bunkers, on re-delivery of ship, at the current market price, at port where she is re-delivered.

Exceptions:

19. That should vessel be lost, any hire paid in advance
68 and not earned (reckoning from the date of her loss) shall be returned to the Charterers with 6 per cent interest from date of loss. The Act of God, the Kings, Enemies, Fire, Restraints of Princes, Rulers and People, and all other dangers and accidents of the seas, rivers, machinery, boilers and steam navigation throughout this Charter Party always excepted.

[Acclimated Crew:

20. Owners to have on board during whole term of this Charter Party an acclimated crew to meet the requirements of the Louisiana and Alabama State Boards of Health.

Idle Time:

21. On any Charter for a period of twelve (12) months or more, the Charterers to have option of laying steamer off hire — each twelve (12) months of this Charter at Owners' expense. In this case, due notice at least ten (10) days to be given Owners, who will have right to employ her in other trades not in competition with the Atlantic Fruit Co.

Jettison of Fruit:

22. Should the vessel be stranded or exposed to other perils resulting in jettison of bananas, and the vessel be ultimately saved,

[*Matter enclosed in brackets erased in copy.]

e shipowners agree to pay to the Charterers for the bananas jet-
oned 50 cents United States currency per stem of bananas and
ther to assume all liability for the banana cargo's contribution to
neral average and salvage expenses.]*

Arbitration:

23. That should any dispute arise between Owners and Charterers,
matters in dispute shall be referred to three persons in New York,
e to be appointed by each of the parties hereto, and the third by
two so chosen; their decision, or that of any two of them, shall
final and for the purpose of enforcing any award, this agreement
y be made a rule of Court. That the Owners shall have a lien
all cargoes and all sub-freights for any amounts due under this
arter, and the Charterers shall have a lien upon the ship for all
neys paid in advance not earned.

24. That if required by Charterers, time not to commence before
and should steamer not be ready for delivery on or before Decem-
1st, 1919. Charterers or their Agents to have the option of
ncelling this Charter, at any time not later than the day of steam-
readiness.

25. Charterers to have the liberty of subletting the Steamer, if
uired by them.]*

26. That a commission of [five]* $2\frac{1}{2}$ per cent upon the gross amount
his Charter, payable by steamship and owners, is due to Bennett,
nd Bowring & Co., one-half each,
oslef & Co. ∧ upon signing hereof, steamship lost or not. And also
on any continuation or extension of this Charter or sale of
vessel.

27. Penalty for non-performance of this Contract, esti-
mated amount of damages.

Signed with additional clause on back. Atlantic Fruit Company.
gd.) T. O. Muller, Vice-Pres., [by cable authority from —— ——,
ed at ——, Agents.]*

We hereby certify this to be a true copy of the original Charter
rty in our possession. Red Cross Line, Bowring & Co. (Sgd.)
as. W. Bowring. Bennett, Hvoslef & Co., Brokers.

28. No goods or contraband of war to be carried and steamer—
to be required to trade to any blockaded ports or ports where
tilities are in progress. Should the United States of America or
rway become involved in War, or in case there is war between any
the world's Great Powers, during this charter, Charterers and
ners have the option of cancelling charter.

29. Fruit fittings to removed in New York and replaced at
the end of the Charter by the Atlantic Fruit Company in
their time and expense, Charterers agreeing to contribute the
np sum of $1,250.00) twelve hundred and fifty and 00/000
lars, U. S. Currency, towards the expense attached to same.

*Matter enclosed in brackets erased in copy.]

30. This charter-party is subject to the approval of the Chart-Executive of the United States Shipping Board.

31. Where the word "Owners" appears in this charter-party the words "Chartered Owners" to apply.

32. It is understood that steamer is to be allowed by Charterers three (3) days once in every three (3) months to clean boilers. This time to count when steamer has steam off her main boiler but that the Captain can so arrange during this time that she can load or discharge with donkey boiler.)

72 Supreme Court, Appellate Division, First Department.

[Title omitted.]

Stipulation and Order Adding to Papers on Appeal to Appellate Division.

Upon the annexed stipulation signed by the attorneys for the respective parties hereto and upon motion of Hunt, Hill and Betts, attorneys for the Atlantic Fruit Company, Appellant, it is hereby

Ordered, That the appellant have leave to file with and in a form similar to that of the papers on appeal heretofore filed in this Court, a printed copy of the copy of contract filed in the Court and marked Exhibit A, which was omitted by mistake from the papers on appeal as filed and which when printed shall be paged 58-59 et seq., and shall contain three folios to the page.

Dated October, 1921.

So ordered. J. P. C.

It is stipulated by and between the attorneys for the respective parties hereto that the copy of the contract which was attached to the original petition as filed in the Court below, marked Exhibit A, and which was omitted by mistake from the papers on appeal as

73 originally filed in this Court, be separately printed, in a form, however, similar to that in which said papers on appeal filed herein were printed, having pages numbered 58, 59, 60, et seq., and containing three folios to the page, and be attached to said papers on appeal as filed, and that the same may be used upon the argument of said appeal with the same force and effect as if originally included in said papers on appeal. Hunt, Hill & Betts, Attorneys for Appellant. Loomis, Barrett & Jones, Attorneys for Respondent.

Judgment, Appellate Division.

[Filed Dec. 9, 1921.]

[Title omitted.]

74 An appeal having been taken to this Court by the Atlantic Fruit Company from an order of the Supreme Court, New York County, entered on the 11th day of August, 1921, directing the Atlantic Fruit Company to proceed to arbitration under Ch. 275, L.

1920, and said appeal having been argued by Mr. John W. Crandall, of counsel for the appellant, and Mr. Homer L. Loomis, of counsel for the respondent, and due deliberation having been had thereon,

It is hereby unanimously ordered, that the order so appealed from be and the same hereby is affirmed, with $10.00 costs and disbursements.

Enter. J. P. C.

75 **Notice of Appeal to Court of Appeals from Appellate Division, First Department.**

[Title omitted.]

SIRS: Please take notice, That the Atlantic Fruit Company hereby appeals to the Court of Appeals from the order entered on the 9th day of December, 1921, affirming an order of a Special Term, Part I of the New York Supreme Court, New York County, entered in the office of the Clerk of the County of New York on the 11th day of August, 1921, whereby the Atlantic Fruit Company was ordered and directed to proceed to arbitration and to appoint its arbitrator pursuant to Chapter 275 of the Laws of 1920, and from each and every part of said order. Yours, etc., Hunt, Hill & Betts, Attorneys for Appellant, Atlantic Fruit Company, 120 Broadway, Borough of Manhattan, New York City. To Messrs. Loomis, Barrett & Jones, Attorneys for Petitioner-Respondent, No. 52 Broadway, Borough of Manhattan, New York City. The County Clerk for the County of New York, County of New York.

76 **Certificate of Clerk.**

STATE OF NEW YORK,
County of New York, ss:

I, James A. Donegan, Clerk of the said County and Clerk of the Supreme Court of said State for said County, do certify that I have compared the preceding with the original Certificate of Remittitur and ret. on file in my office and that the same is a correct transcript therefrom, and of the whole of such original.

Indorsed Filed, Sept. 10, 1921.

In Witness Whereof, I have hereunto subscribed my name and fixed my official seal this 20th day of February, 1922. James A. Donegan, Clerk. [New York Seal.]

Affidavit of No Opinion in Appellate Division.

[Title omitted.]

77 STATE OF NEW YORK,
County of Albany, ss.

Reginald B. Williams, being duly sworn, deposes and says he is an attorney at law and associated with the firm of Loomis, Barrett &

Jones, Attorneys for the Petitioner-Respondent herein, and in charge of the above entitled matter, and that no opinion was handed down by the Appellate Division, First Department, on the affirmance of the order herein. Reginald B. Williams.

Sworn to before me, this 25th day of Feb., 1922. Wm. J. Le Compte, Comm. of Deeds, City of Albany.

78 **Remittitur from Court of Appeals.**

[Filed June 1, 1922.]

[Title omitted.]

Witness the Hon. Frank H. Hiscock, Chief Judge, presiding. R. M. Barber, Clerk. Remittitur June 1, 1922.

In the Matter of the Petition of RED CROSS LINE for an Order Directing Atlantic Fruit Company to Proceed to Arbitration.

Be it remembered, That on the 23rd day of February in the year of our Lord one thousand nine hundred and twenty two Atlantic Fruit Company, the appellant in this cause came here into the Court of Appeals, by Hunt, Hill & Betts, its attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the
79 First Judicial Department. And Red Cross Line the respondent in said cause, afterward appeared in said Court of Appeals by Loomis, Barret & Jones, its attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. John W. Crandall of counsel for the appellant, and by Mr. Homer L. Loomis of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the orders herein be and the same hereby are reversed and proceeding dismissed, with costs in all courts.

And it was also further ordered that the record aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore it is considered that the said orders be reversed etc., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law and which record now remains in the said Supreme Court before the Justices thereof, etc. R. M. Barber, Clerk of the Court of Appeals of the State of New York.

80 Court of Appeals, Clerk's Office.

Albany, June 1, 1922.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals with the papers originally filed therein, attached thereto. R. M. Barber, Clerk. [Seal State of New York Court of Appeals.]

81 & 82 **Order for Judgment on Remittitur.**

[Filed July 5, 1922.]

At a Special Term, Part II, of the Supreme Court of the State of New York Held in and for the County of New York at the County Court House, Borough of Manhattan, New York, on the 5th Day of July, 1922.

Present: Hon. Philip J. McCook, Justice.

[Title omitted.]

Upon the remittitur in the above entitled action and on motion of Hunt, Hill & Betts, attorneys for Atlantic Fruit Company, it is

Ordered that the judgment of the Court of Appeals be the judgment of this Court and the clerk is hereby directed to enter judgment in favor of the Atlantic Fruit Company and against Red Cross Line for taxable costs and disbursements.

Enter: P. J. McC., J. S. C.

[Endorsement omitted.]

83 **Judgment for Costs on Remittitur.**

[Filed July 26, 1922.]

[Title omitted.]

An order of the Special Term, Part I, of the Supreme Court, New York County, having been entered herein on the 11th day of August, 1921, compelling the Atlantic Fruit Company to proceed to arbitration and to appoint its arbitrator on or before the 20th day of August, 1921, with $10.00 costs, and the Atlantic Fruit Company having appealed from said order to the Supreme Court, Appellate Division, First Department, and said Appellate Division having by an order dated and entered the 9th day of December, 1921, affirmed said order with $10.00 costs and disbursements, and the Atlantic Fruit Company having appealed from said orders to the Court of Appeals, and the said Court of Appeals having sent hither its remittitur filed herein the 1st day of June, 1922, by which it appears that the said Court of Appeals has reversed the said orders of the

Special Term and of the Appellate Division and dismissed the pr
ceeding with costs in all Courts, and has remitted the jud
84 ment of said Court of Appeals to this Court to be proceede
upon and enforced according to law, and this Court havin
by an order duly entered herein on the 6th day of July, 1922, o
dered that said judgment be made the judgment of this Court, an
the appellant, Atlantic Fruit Company's costs having been dul
taxed in the sum of —.

Now, on motion of Hunt, Hill & Betts, attorneys for appellan
Atlantic Fruit Company, it is

Ordered, that the order of the Appellate Division of the Suprem
Court for the First Judicial Department, entered in the Office of th
Clerk of the County of New York on the 9th day of December, 192
and the order of the Special Term, Part I, of the Supreme Cour
New York County, entered in the Office of the Clerk of the Count
of New York on the 11th day of August, 1921, be and the sam
hereby are reversed with costs; and it is

Further ordered, that the appellant, Atlantic Fruit Company re
cover of the respondent, Red Cross Line, the sum of $448.47 cost
as taxed, and have execution therefor.

Dated, New York, July 26, 1922. James A. Donegan, Clerk.

85 [Endorsement omitted.]

86 **Clerk's Certificate.**

STATE OF NEW YORK,
County of New York, ss:

I, James A. Donegan, Clerk of the said County and Clerk of th
Supreme Court of said State for said County, Do Certify, That I hav
compared the preceding with the original Remittitur from Court o
Appeals in In the Matter of the Petition of Red Cross Line for a
order directing Atlantic Fruit Company to proceed to Arbitration
on file in my office, and that the same is a correct transcript there
from, and of the whole of such original.

In witness whereof, I have hereunto subscribed my name and af
fixed my official seal, this 28 day of August, 1922. James A. Done
gan, Clerk. [Seal New York.]

O. K. G. E. P.

87 & 88 Pages 86-88, Folios 258-264, in Copy of Record.

STATE OF NEW YORK, *ss:*

Court of Appeals, State Reporter's Office.

I, J. Newton Fiero, Reporter of the Court of Appeals of the Stat
of New York, do hereby certify that I have compared the annexed
copy of opinion in the case of In the Matter of the Petition of the
Red Cross Line, Respondent, for an Order Directing the Atlantic
Fruit Co. etc. decided by the Court of Appeals on the 31st day of

May 1922, with the official opinion rendered in such case, and I further certify that the same is a true and correct copy of said opinion and of each and every part thereof.

In witness whereof, I have hereunto affixed my signature as Reporter of the Court of Appeals, at the City of Albany, in the State of New York, this 11th day of August 1922. J. Newton Fiero, As Reporter of the Court of Appeals of the State of New York. Attest: R. M. Barber, Clerk of the Court of Appeals. [Seal of Court of Appeals, State of New York.]

STATE OF NEW YORK:

Court of Appeals.

I, Frank H. Hiscock, Chief Judge of the Court of Appeals of the State of New York, the highest Appellate Court and Court of Record in and for said State, do hereby certify that Richard M. Barber is the clerk of said court, having custody of the seal of said court and of the decisions, minutes and records thereof, and that J. Newton Fiero is the official reporter of said court, having custody of the official opinions, written and handed down by said court and the members thereof, and of the official publication and reports thereof; and I further certify that the attestation and authentication, by said clerk and said reporter of the annexed copy of the official opinion rendered in the case of In the Matter of the Petition of the Red Cross Line, Respondent, for an Order Directing the Atlantic Fruit Co. etc. decided by the said Court of Appeals on the 31st day of May 1922, is in due form and sufficient under the laws of the State of New York and the rules and practice of the said Court of Appeals; that the seal imprinted thereon is the true and genuine seal of the said Court of Appeals, and that the signature of Richard M. Barber, as clerk of said court, appended thereto is the true and genuine signature of said Richard M. Barber, and the signature of J. Newton Fiero, as reporter of said court, appended thereto is the true and genuine signature of said J. Newton Fiero.

In witness whereof, I have hereunto subscribed my official signature at the Chambers of said court at the Court of Appeals Hall, in the City of Albany and State of New York, on the 11th day of August in the year one thousand nine hundred and twenty-two. Frank H. Hiscock, As Chief Judge of the Court of Appeals of the State of New York.

89 **Opinion of Court of Appeals, Hogan, J.**

(Filed May 31, 1922.)

In the Matter of the Petition of THE RED CROSS LINE, Respondent, for an Order Directing the Atlantic Fruit Company, Appellant, to Proceed to Arbitration.

(Decided May 31, 1922.)

Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered December, 1921, which unanimously affirmed an order of Special Term directing the appellant herein to proceed to arbitration and to appoint its arbitrator pursuant to the provisions of chapter 275, Laws of 1920.

November 28th, 1919, the petitioner, Red Cross Line, respondent, and the appellant, Atlantic Fruit Company, entered into a written agreement of charter party wherein appellant was described as "chartered owners" of the steamship Runa and referred to as "owners," and the respondent "Red Cross Line" was designated as "charterers."

By the terms of the charter party the owners let and the charterers hired the steamship Runa from the time of delivery at Philadelphia, Pa., with sufficient bunkers to take the steamer to New York, for one round trip between New York and any safe port or ports in Canada or other British possessions not north of the St. Lawrence River.

The owners covenanted to provide and pay for all provisions, wages and consular shipping and discharging fees of captain, officers, firemen and crew, pay for the insurance of the vessel, also for all engine room and deck stores and maintain the vessel in a thoroughly efficient state. The charter party provided that in the event of loss of time from deficiency of men or stores, breakdown
90 of machinery or damages preventing the working of the steamer for more than twenty-four hours at sea the payment of hire should cease until service was resumed, and should the vessel, in consequence, put into any port other than that to which it was bound, the port charges, etc., should be borne by the "owners"; further, that if any loss of time occurred from crew or stores not being on board in time, repairs not being complete after cargo and coals on board and hour of sailing had been fixed by "charterers" and notice given to captain, the time was lost to the "owner's" account.

The "charterers" covenanted to pay and provide for all the coal, port charges, pilotage agencies and commissions and for the use of the vessel twenty-five thousand dollars per calendar month and at the same rates for any part of a month until delivery of the vessel to owner (unless lost), payment to be made in cash half monthly in advance from the date of delivery of steamer, also for all the coal in steamer's bunkers on delivery, the owners to pay for all

l left in bunkers on redelivery of ship at port where redelivered. default of payment of hire the "owners" had the right to with- w the steamer from the service of "charterers" without preju- e to any other claims under the charter.

Further provisions of the charter party were: "The captain shall secute his voyage with the utmost disptach."

"That should any disputes arise between owners and charterers matters in dispute shall be referred to three persons in New rk, one to be appointed by each of the parties hereto and the third by the two so chosen; their decision, or that of any two of them, shall be final and for the purpose of enforcing any award, this agreement may be made a rule of Court."

A dispute and controversy arose between the parties. On April , 1920, the "charterers" demanded that the "owners" join with "charterers" in an arbitration of said dispute as provided by charter party. The "owners" refused to accede to the demand d thereupon the present proceeding was instituted under chapter 5, Laws of 1920, for an order directing the "owners" to appoint arbitrator and proceed to arbitration as provided for in the char- party contract.

The petition presented to the Court set out in full the charter party ntract and in substance as to dispute and controversy between the rties, the following:

(*a*) That the steamer cleared from the port of New York for the rt of St. Johns, normally an eight-day run from New York, on De- mber 6th, 1919, and was ready to proceed in the evening of that y and the master was ordered so to do by the "charterers," but re ed to proceed until the following day, December 7th, 1919, a dless delay of twelve hours, and the master did not, as required the charter party, "prosecute said voyage with the utmost dis- ch."

(*b*) That when within approximately one hundred miles of St. hns, Newfoundland, the port of destination, the master turned the mer about and proceeded to the Azores, distant from St. Johns out thirteen hundred miles, where the Runa was kept by the master twenty-one days until January 5th, 1920, and finally arrived at Johns on January 14th, 1920, and that thirty-nine days were consumed on the voyage from New York to Newfoundland, instead of eight days, the normal running time.

(*c*) That the steamer consumed an excess quantity of coal ceeding two hundred ninety-eight tons over the amount reasonably uired.

(*d*) That petitioners in ignorance of the true state of facts until er the return of the steamer and in view of the right of the Fruit mpany under the charter contract to withdraw the steamer from service of petitioner unless the hire of the same was paid in ad- nce, paid to the "owners" under protest, charter hire, cost of fuel d other disbursements aggregating $35,256.96 which the Fruit mpany after demand has refused to repay and which items and r-payment constitute a dispute and controversy between the rties.

The answer to the petition filed by respondent denied:

(*a*) That the master did not prosecute the voyage with the utmost dispatch, viz., in leaving New York on the evening of December 6th, and affirmatively alleged that the pilot appointed by the pilotage authorities in the port of New York pursuant to law refused to take the steamship Runa out to sea on the evening of December 6th, 1919, on the ground that it was not safe to do so.

(*b*) Denied that the steamer as alleged was turned about and proceeded to the Azores, kept there by the master for a period of twenty-one days, finally arriving at St. Johns, January 14th, 1920, and that an excess quantity of coal was taken aboard the steamer.

93 (*c*) Denied knowledge or information sufficient to form a belief that the "charterers" were ignorant of the true state of facts alleged until after the re-delivery of the steamer and that in order to protect its rights paid to the owner the charter hire, cost of fuel and other disbursements.

(*d*) Denied that any amount is due the respondent.

(*e*) Admits that a dispute and controversy has arisen and exists between the parties and its refusal to arbitrate the same.

As an affirmative defense and answer it was alleged:

That the dispute or controversy between the parties set forth in the petition and answer being one arising out of a charter party is a maritime dispute and is a cause of "admiralty and maritime jurisdiction" over which causes the United States courts are clothed with exclusive jurisdiction pursuant to the Constitution of the United States, and that the statute of this state, chapter 270, Laws of 1920, provides an additional remedy unknown to the common law for the settlement of disputes by compelling parties to arbitrate them, if they have agreed to do so; that such a remedy is not applicable to disputes within the admiralty and maritime jurisdiction of the United States courts.

That the steamship Runa was not owned by appellant but chartered by it under a charter party like unto the one in the present case from Hage Waage, a Norwegian, and under the charter the entire navigation of the steamship was under the control of the master, officers and crew appointed and employed by Waage, the true

94 owner, and not by appellant, and any fault or neglect was the omission or fault of the owner Waage and not of appellant; that under the law and practice of the United States courts in admiralty a remedy exists in appellant in a suit in admiralty to bring in a party ultimately liable and in case such party is a non-resident attachment may issue aga-nst his property; therefore, the United States court where all parties interested may be heard is the proper tribunal for adjustment of the rights of all parties in one action.

John W. Crandall and E. F. Rapallo for appellant.

Homer L. Loomis, and Reginald B. Williams for respondent.

Hogan, *J.*: Section 2, article 3 of the Federal Constitution provides: "The judicial power shall extend * * * to all cases of admiralty and maritime jurisdiction."

The Judicial Code confers upon the District Courts original jurisdiction of all civil causes of admiralty and maritime jurisdiction

ing to suitors in all cases the right of common-law remedy where common law is competent to give it. Section 256 of the Judicial le provides: "The jurisdiction vested in the courts of the United tes * * * shall be exclusive of the courts of the several tes."

The appellant having invoked the foregoing provisions of the leral Constitution in opposition to the granting of an order of itration and thereby made the provisions of the Constitution ted, as amplified by the Judicial Code, the subject of construction, appeal is properly before this court. (Code Civ. Pro. § 191, d. 1.)

By reason of an alleged breach of contract of a charter party contract by the owner of a steamship, and a clause contained in said contract that any dispute or controversy between the parties thereto shall be determined by arbitration, the charers have thus far sustained an order of the Supreme Court directthe owner to proceed to arbitration as provided in the Arbitration v. The fundamental question to be determined upon this apl is whether or not the controversy between the parties is one of niralty or of state jurisdiction. If the dispute be one of jurisdicn by the admiralty court, the state court was powerless to order the ner to proceed to arbitration notwithstanding the clause of the conct providing for the settlement of disputes arising thereunder.

n a consideration of the question as to the jurisdiction of the Sume Court we must examine the petition and answer thereto used n the application for the order directing arbitration and deterne therefrom the subject-matter of the charter party contract and nature of the controversy to be submitted to arbitration. A repeon of the language of the contract and of the petition and answer nnecessary. A synopsis of the provisions of the instrument is forth in the statement preceding our conclusions and discloses t the subject-matter of the contract is the use of a steamship and nsportation of a cargo from the port of New York to a port of rfoundland, consequently the contract pertains to navigation. the allegations of the petition and of the answer is presented the stions: Is the owner of a steamship under charter liable to charrs for delay in sailing from a port when a duly licensed pilot, ler pilotage laws, believes it unsafe to take the vessel to sea? Is the master of a steamship justified in turning the steamship about and proceeding temporarily to a port other than the port of destination? Necessarily an answer to the questions ependent upon the facts and circumstances surrounding the rel of the pilot to immediately take the vessel to sea, the act of master of the vessel in turning the vessel from its course and ceeding to the Azores and the reasonableness or necessity of the ged delay at the latter port. We may assume that the condition the weather, the seaworthiness of the steamship, the existing ation at the time of the deviation of the vessel from its course the safety of the steamship and cargo would have an important ring upon the questions propounded; therefore, the subject of controversy existing between the parties is clearly one pertain-

ing to navigation; consequently, the question of liability or non-liability of the owner to the charterer is within the exclusive jurisdiction of the courts of admiralty. We cannot attribute to the legislature an intention to limit or usurp the jurisdiction of the Federal courts. The section of the Arbitration Law (Section 3) under which the order herein was granted has been construed by us as a statutory legal remedy of a character unknown to the common law (Matter of Berkovitz vs. Arbib & Houlberg, Inc., 230 N. Y., 261); it therefore, is not embraced within the exceptions contained in the Judicial Code.

Counsel for the charterers urges that a remedy provided in the state court that makes available a remedy for the settlement of a maritime controversy through the specific performance of an agreement for that remedy is not an infringement of the jurisdiction of the Admiralty courts; that the charterers are not seeking a judgment for overpaid charter hire, etc., but an order decreeing that the
97 arbitration proceed in the manner provided by the contract.

Even if we assume that the proceeding is practically one to enforce specific performance of the arbitration clause of the contract, an order granting such relief presupposes the existence of a controversy the subject-matter of which is within the jurisdiction of the court granting the order. It would be idle ceremony for the courts to grant an order requiring specific performance of an agreement to arbitrate a dispute, where upon an examination of the papers presented as the basis for such an order it is apparent that the subject-matter of the controversy which the "charterers" desire submitted to arbitration clearly arose under maritime clauses in a charter party over which the arbitrators could not assume jurisdiction even if arbitration was ordered.

In the present case, the agreement to arbitrate which is sought to be enforced is part of a maritime contract. It is contained in a charter party and such clause is void in the federal forum. (United States Asphalt Refining Co. vs. Trinidad Lake Petroleum Co., 222 Fed. Rep., 1006, and cases cited therein.)

To sustain the arbitration clause and enforce the same in the state courts would deny to the federal court the exclusive jurisdiction with which Congress has clothed it, and likewise destroy a rule of uniformity. (So. Pac. Co. vs. Jensen, 244 U. S., 205; Knickerbocker Ice Co. vs. Stewart, 253 U. S., 149.)

The order appealed from should be reversed and the proceedings dismissed, with costs in all courts.

Hiscock, Ch. J., Cardozo, Pound, McLaughlin, Crane and Andrews, JJ., concur.

Order reversed, etc.

98 [Title omitted.]

The writ of certiorari in the above entitled case having been granted to the above entitled petitioner to review the judgment and decision of the Supreme Court for New York County, New York State, in the above entitled cause in which Red Cross Line was petitioner, and Atlantic Fruit Company was respondent:

Now it is therefore stipulated and agreed between counsel for the above named petitioner and counsel for the above named respondent that the Transcript of Record of the said Supreme Court for New York County, New York State, in the said cause now on file in the Supreme Court of the United States, be taken as a return to the said writ and that the Clerk of the Supreme Court for New York County, New York State, forward a certified copy of this stipulation to the Clerk of the Supreme Court of the United States forthwith, as his return to the said writ of certiorari.

Dated New York City, December 9th, 1922. Homer L. Loomis, Counsel for above Petitioner. John W. Crandall, Counsel for above Respondent.

STATE OF NEW YORK,
County of New York, ss:

Supreme Court for New York County, State of New York.

December 21", 1922.

In obedience to the writ of certiorari hereto attached and returned herewith, I hereby certify that the foregoing contains a true copy of the stipulation of counsel in the case therein stated as appears from the original now on file in this office.

Witness my signature and the seal of the said Court hereto affixed, the day and year above written. James A. Donegan, Clerk of the Supreme Court for New York County, New York State. [Seal New York.]

99 [Endorsement omitted.]

100 **Writ of Certiorari.**

[Filed Dec. 26, 1922.]

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of New York, New York County, Greeting:

Being informed that there is now pending before you a suit entitled In the matter of the Petition of Red Cross Line for an order directing Atlantic Fruit Company to proceed to arbitration, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Supreme Court and removed into the Supreme Court of the United States,
101 do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings

in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the second day of December, in the year of our Lord one thousand nine hundred and twenty-two. Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

102 [Endorsement omitted.]

103 & 104 [Endorsement omitted.]

FILED
AUG 31 1922
WM. R. STANSBURY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1922.

No. 588 112

RED CROSS LINE,

Petitioner,

against

ATLANTIC FRUIT COMPANY,

Respondent.

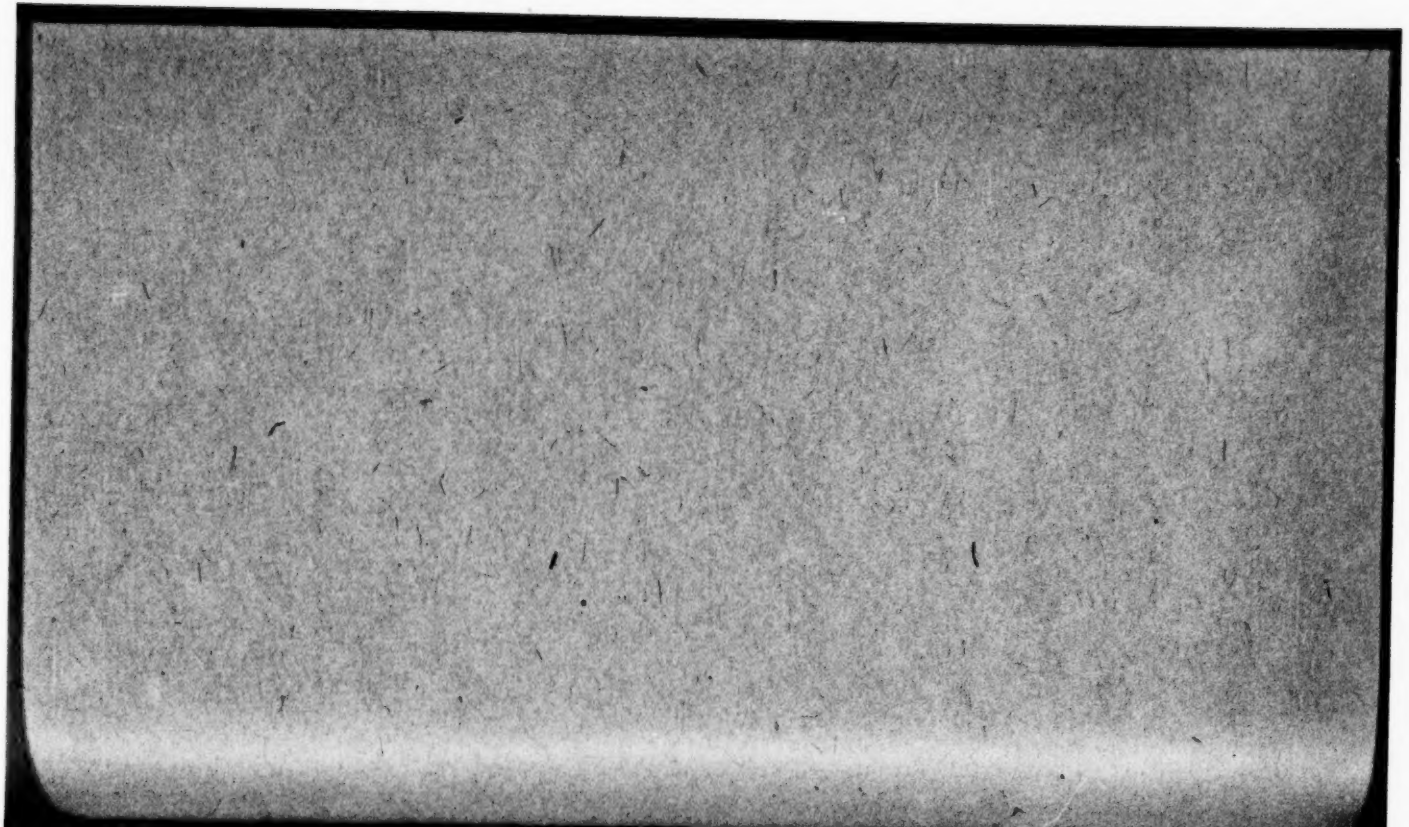
In the Matter

of

The petition of RED CROSS LINE for an order directing ATLANTIC FRUIT COMPANY to proceed to arbitration.

NOTICE OF MOTION, PETITION AND BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR NEW YORK COUNTY, NEW YORK STATE.

HOMER L. LOOMIS,
Counsel for Petitioner.



Order of Appearance.

SUPREME COURT,
OF THE UNITED STATES,

October Term, 1922.

No.

RED CROSS LINE,
Petitioner,
against
ATLANTIC FRUIT COMPANY,
Respondent.

In the Matter
of
The petition of Red Cross Line for an order directing Atlantic Fruit Company to proceed to arbitration.

Petition for Writ of Certiorari to the Supreme Court for New York County, New York State.

The Clerk will enter my appearance as counsel for the Petitioner.

HOMER L. LOOMIS,
52 Broadway,
Borough of Manhattan,
New York City.

Notice of Petition.

SUPREME COURT,
OF THE UNITED STATES,
October Term, 1922.
No.

RED CROSS LINE,
Petitioner,
against
ATLANTIC FRUIT COMPANY,
Respondent.

In the Matter
of
The petition of Red Cross Line for an order directing Atlantic Fruit Company to proceed to arbitration.

Please take notice that the annexed petition for a Writ of Certiorari to the Supreme Court for New York County, New York State, will be submitted to the Supreme Court of the United States at the opening of Court on October 2nd, 1922, or as soon thereafter as counsel may be heard.

Dated, New York, August , 1922

HOMER L. LOOMIS,
Counsel for Petitioner,
52 Broadway,
New York City.

To:
Messrs: HUNT, HILL & BETTS,
Attorneys for Respondent,
120 Broadway, New York City.

The Petition.

TO THE

SUPREME COURT,

OF THE UNITED STATES,

RED CROSS LINE,
Petitioner,

against

ATLANTIC FRUIT COMPANY,
Respondent.

In the Matter
of
The petition of Red Cross Line for an order directing the Atlantic Fruit Company to proceed to arbitration.

Your petitioner respectfully shows:

1. In April, 1920, the Legislature of the State of New York by Chapter 275 of the Laws of 1920, enacted a law hereinafter referred to as the Arbitration Statute, in Section 2 whereof it declared that agreements to arbitrate were valid and enforceable and in Section 3 whereof it provided a method whereby to facilitate the specific performance of such agreements. For the convenience of the Court a copy of said law together with the amendment of 1921 is attached hereto as an appendix.

2. On April 12, 1921, Red Cross Line, a British Corporation, hereinafter called the petitioner, pursuant to said Statute, filed a petition in the Supreme Court, New York County, praying for an order directing Atlantic Fruit Company, a Delaware corporation, hereinafter called the respondent, to join with the petitioner in an arbitration in accordance with an arbitration agreement contained in a charter-party to which they were parties and under which a controversy had arisen.

3. Briefly stated the petition set forth:

That on Nov. 28, 1919 respondent had chartered to petitioner the steamship Runa for one round trip between New York and a safe port in British North America at a hire of $25,000 00 per month; that among other provisions in said contract it was provided that the captain should prosecute the voyage with the utmost dispatch; that in the event of damages preventing the working of the steamer for 24 hours at sea payment of hire should cease until the vessel was again in an efficient condition to resume her journey and that any loss of time occasioned by repairs to hulls or machinery or by deficiency of crew or stores, should be for respondent's account; that it was further provided by Article 23 of said contract as follows:

> "23. That should any dispute arise between owners and charterers the matter in dispute shall be referred to three persons in New York, one to be appointed by each of the parties hereto and the third by the two so chosen; their decision or that of

any two of them shall be final and for the purpose of enforcing any award this agreement shall be made a rule of the court."

That thereafter the said steamship entered upon the performance of said contract and on December 6th cleared the port of New York bound for St. Johns, Newfoundland; that the Captain did not prosecute the voyage with the utmost dispatch; that when within 100 miles of his destination, the master turned the steamer around and went into the Azores where she was laid up for 21 days, thereby consuming 39 days in the trip to St. Johns instead of the 8 days ordinarily required; that petitioner, being in ignorance of the true facts until the return of the steamer to New York and in order to prevent her premature withdrawal for non-payment of hire and otherwise to protect its rights, paid to respondent under protest hire and disbursements at the times and in the amount stipulated in the contract; that by reason of these facts petitioner had overpaid to respondent hire and disbursements in the sum of 35,256.96, of which sum petitioner demanded the repayment; that respondent had refused and disputed its liability to repay the same; that a dispute having thus arisen petitioner pursuant to said Article 23 called upon respondent to arbitrate the same; and that respondent had refused and still refuses to arbitrate. The petitioner concluded with a prayer for the relief hereinbefore described.

4. After the petitioner had served and filed the petition in the State Court respondent re-

moved the same to the United States District Court for the Southern District of New York on the ground that it was a civil suit between an alien and a non-resident wherein the amount in controversy was over $3,000 and on the further ground that it was a suit arising under the constitution or laws of the United States. Petitioner appearing specially in the District Court moved to remand the suit to the State Court and respondent made a counter motion to dismiss the same for lack of jurisdiction. The District Court denied the motion to dismiss and remanded the suit on the ground that it was not a suit in which the jurisdictional amount of $3,000.00, as required by the removal statute, was involved In Re Red Cross Line, 277 Fed. Rep. 853.

5. The respondent thereafter filed an answer to the petition in the State Court in which among other things, it admitted the agreement to arbitrate and that it had refused so to do. Respondent alleged, however, as a complete defense, that the dispute set forth in the petition, being one arising out of a charter-party, was a maritime dispute and a cause over which the Admiralty Court has exclusive jurisdiction, except in so far as a common law remedy is saved; that the State Statute "provided (to quote respondent's language) an additional remedy unknown to the common law for the settlement or adjustment of disputes by compelling parties to arbitrate them if they have agreed to do so"; and that, in so far as the statute was intended to apply to agreements to arbitrate disputes arising over matters within the maritime juris-

diction, said statute was contrary to Article III, Section 2, of the Federal Constitution and Sections 24 and 256 of the Judicial Code conferring jurisdiction over such disputes on the Admiralty Court

6. At the hearing of the petition at a Special Term of the Supreme Court of the State of New York and thereafter on the hearing of the appeals hereinafter referred to, petitioner contended (a) that there was no question of maritime jurisdiction involved, the statute providing in express terms and the petitioner seeking only a remedy to enforce not the rights in dispute but the specific agreement to arbitrate, which agreement in itself was a strictly non-maritime agreement; (b) that even if, by reason of the agreement's being contained in a charter-party, it could be considered maritime, the remedy to enforce it was the common-law remedy of specific performance; and (c) that even if the statute could be said to furnish a remedy for the adjustment of controversies it was not such a remedy as infringed the admiralty jurisdiction.

7. Thereafter Mr. Justice Burr, handing down a memorandum opinion, granted the petition and entered the order heretofore referred to directing respondent to proceed to arbitration in accordance with its contract. From said order an appeal was thereafter carried to the Appellate Division of the Supreme Court, where without opinion the order was unanimously affirmed.

8. Thereafter an appeal carried to the Court of Appeals of the State of New York, which is the

highest court of the State, the order of the Appellate Division was unanimously reversed on May 31, 1922, and the proceedings were ordered to be dismissed. The Court of Appeals in the opinion setting forth the grounds of its decision reasoned in brief that, the charter-party agreement, of which the arbitration agreement was a part, being one for the use of a steamship and the transportation of cargo from the port of New York to a foreign port and the controversy between the parties being one pertaining to navigation, "the question of liability or non-liability of the owner to the charter is within the exclusive jurisdiction of the courts of admiralty;" that to sustain the arbitration agreement and enforce the same in the State Court would deny to the Federal Courts the exclusive jurisdiction with which Congress had clothed them and destroy the uniformity essential to the Admiralty Jurisdiction; and that if the arbitration agreement should be specifically enforced, its enforcement would be an idle proceeding because the arbitrators could not assume jurisdiction over a maritime dispute.

9. The remittitur from the Court of Appeals was returned to the Supreme Court of the State of New York, New York County, on July 5 1922 and a judgment on said remittitur making the judgment of the Court of Appeals the judgment of the said Supreme Court was entered on July 5, 1922.

10. The question involved in this case is the following: Is a State Statute that provides for use in the courts of that State a method

specifically to enforce arbitration agreements unconstitutional as an infringement of the maritime jurisdiction when applied to an arbitration agreement contained in a charter-party, the controversies to be arbitrated arising subsequent to the making of the agreement and being such as are cognizable in the Admiralty Court?

11. Your petitioner avers that the present case is one in which it is proper for this Court to grant a writ of certiorari, because: (1) There has been a final judgment of the Court of Appeals of the State of New York which is the highest court in the State in which a decision can be had; (2) The case is one in which the validity of the application of a State Statute was drawn in question on the ground that it was repugnant to the constitution and laws of the United States, and the decision was against the validity of the application; (3) It is a case within Section 237 of the Judicial Code allowing said writ in a "cause where * * * is drawn in question the validity of a statute of, or an authority exercised under any state on the ground of their being repugnant to the constitution or laws of the United States and the decision is against their validity."

12. Your petitioner further avers that the present case is one in which it is proper to review the decision of the Court of Appeals for the following reasons, among others:

(a) The Court of Appeals based its decision on the ground that to enforce the arbitration agreement in the State courts "would deny to

the federal courts the exclusive jurisdiction with which Congress had clothed it" (them).

This conclusion is unwarranted, whether the State remedy is considered (1) a remedy to enforce the specific agreement to arbitrate or (2) a remedy to enforce the alleged rights in the controversy.

If the first of these two alternatives be true the State remedy enforced an agreement that is collateral to and independent of the other obligations of the charter-party and is itself non-maritime in nature; while even were it maritime its specific performance pursuant to the decree of an equity court would not infringe the Admiralty jurisdiction, which lacks the power to compel such performance.

On the other hand, to consider the second of the alternatives above noted, if the remedy, although in terms one to enforce the agreement to arbitrate is as respondent contended one used to enforce the alleged rights in the controversy it is not a remedy that infringes the exclusive jurisdiction of the Admiralty court because the suit is one *in personam* in which the court by a mere auxiliary process authorized by a State Statute enforces an agreement that the merits of the controversy shall be conditioned upon the report of arbitrators as upon any other extrinsic fact which agreement might prescribe. A judgment *in personam* is entered upon this report and the proceeding is therefore "essentially a proceeding according to the course of the common law" and within the saving clause of the judicial code.

(b) No inhibition exists in the provisions of the Constitution or the judicial code, conferring jurisdiction on the admiralty court against parties' agreeing to submit or submitting maritime controversies to arbitrators nor is there any authority for the ruling that arbitrators in such an event would not have jurisdiction.

The holding of the Court of Appeals to the effect that to enforce in the state court the parties' own agreement would deny to the federal court the exclusive jurisdiction of maritime causes, because such enforcement would make available a remedy for the adjustment of maritime disputes without the admiralty court is not only an unprecedented judicial extension of the jurisdictional provisions, but also, it is submitted, a decision that should not be upheld except upon strict principle and obvious necessity.

13. Your petitioner further avers that it is of great commercial importance that a decision of the question here presented be made by this Court.

Arbitration clauses are common in maritime as well as non-maritime contracts. The leading commercial State in the Union now has a statute providing in effect for their specific enforcement and in view of the favorable attitude assumed toward such legislation in general by representative public bodies, such as Bar Associations and Chambers of Commerce, national, state and local, it is likely that other states will follow New York's lead.

If the New York Court of Appeals is correct in its decision, it would seem that the benefits of such legislation are to be denied to a large and important part of the public; a result that, in view of the grounds of that Court's decision, it may be not even Congress could correct unless and until the Constitution of the United States was amended.

14. Because of the foregoing reasons your petitioner prays that a writ of certiorari may issue in this case to the Supreme Court, New York County, in the State of New York, to bring up this case to this Court for such proceedings therein as may be just.

Respectfully submitted,

RED CROSS LINE
By Bowring & Company,
Agent.
By Cyril Bowring
Director

HOMER L. LOOMIS,
Counsel for Petitioner.

State of New York, }
County of New York, } ss.:

Cyril Bowring being duly sworn, deposes and says that he is a director of Bowring & Company, the agent in the United States for Red Cross Line, the petitioner herein; that he has read the foregoing petition,

and that the same is true to his own knowledge, except as to matters therein alleged to be stated upon information and belief, and that as to those matters he believes it to be true. That the reason this verification is made by Bowring & Company by deponent is that Red Cross Line is a British corporation, none of whose officers are within the jurisdiction, and Bowring & Company is its agent, and has authority and deponent is an officer of said agent.

Sworn to before me this
24 day of August 1922.
Vincent O'Dwyer
Notary Public
New York County Clerk's No 301

Cyril Bowring

Seal

I HEREBY CERTIFY that I have examined the foregoing petition and that in my opinion the petition is well founded, and the case is one in which the prayer of the petitioner should be granted by this court.

HOMER L. LOOMIS,
Counsel for Petitioner.

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM 1922.

RED CROSS LINE,

Petitioner,

versus

ATLANTIC FRUIT COMPANY,

Respondent.

In the Matter

of

The petition of RED CROSS LINE for an order directing ATLANTIC FRUIT COMPANY to proceed to arbitration.

BRIEF IN BEHALF OF PETITIONER IN SUPPORT OF APPLICATION FOR WRIT OF CERTIORARI.

HOMER L. LOOMIS,
Counsel for Petitioner.

HOMER L. LOOMIS,
REGINALD B. WILLIAMS,
Of Counsel.

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PETITIONER'S BRIEF.

SUPREME COURT,
OF THE UNITED STATES.

RED CROSS LINE,
Petitioner,
against
ATLANTIC FRUIT COMPANY,
Respondent.

In the Matter
of
The petition of Red Cross Line for an order directing Atlantic Fruit Company to proceed to arbitration.

POINT I.

The Court of Appeals of the State of New York erred in holding that to enforce in the State Courts the parties' agreement to arbitrate contained in a charter-party would deny to the Federal Courts the exclusive jurisdiction with which Congress had clothed them.

Petitioner brought its petition for the specific performance of the arbitration agreement in the equity part of the Supreme Court, New York County, invoking for that purpose the quick

and efficient procedure provided in the Arbitration Statute. Section 3 of the Statute* provides in terms a "remedy" for the "party aggrieved" to enforce "a contract or submission providing for arbitration on the "failure, neglect or refusal of another to perform".

In so far as there has been any judicial interpretation of Section 3 of said statute, it is consonant with the *expressed* intent of the act. It has been judicially declared not only that the said section *"prescribes the procedure for the enforcement of the contract* (*Berkowitz* v. *Arbib & Houlberg*, 230 N. Y. 261-269) but also that *the "act is intended to compel specific performance of contracts for arbitration"* and in the absence of such a contract it provides no remedy whatever (*Matter of Division*, 132 etc, 196 App Div. 206-212).

The courts have never denied that the agreement to arbitrate created a right. In *Berkowitz* v. *Arbib & Houlberg*, (*supra*), the contention was made that prior to the enactment of the Statute such an agreement did not create a right but the court held this view to be erroneous and said at page 271:

> "Public policy *was thought** to forbid that the promise *be specifically performed*. Public policy *did not forbid an award of*

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* For the convenience of the Court a copy of the statute, together with amendment is attached hereto as an appendix.

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* All italics appearing herein unless otherwise noted are the writers.

damages if it was broken (*Haggert* v. *Morgan*, 5 N. Y. 422, 427; *Finncane Co.* v. *Board of Education*, 190 N. Y. 7683)."

And in *Hamilton* v. *Home Ins. Co.* 137 U. S. 370, this Court said at page 385, that if the agreement was so phrased that it could not be considered as a condition precedent to an action on the principal contract, it was "well settled that the agreement for submitting the amount to arbitrators is collateral and independent and * * * will support a separate action".

In view of the express provision of the statute and the judicial declaration in reference thereto to the effect that the remedy furnished is one to enforce the contractual right to arbitration, the application of the remedy to the independent contract to arbitrate incorporated in a charter-party does not infringe the jurisdiction of the admiralty court unless at least this independent contract is maritime and subject to the admiralty jurisdiction. The doctrine that the "essential requisite of a contract to bring it within the admiralty jurisdiction" and the "true criterion" for its determination is "an undertaking for the performance of a maritime services" has been so often asserted that it must now be treated as settled. (*North Pacific S. S. Co.* v. *Hall Bros. Co.*, 249 U. S. 119-125; *Peoples Ferry Co. etc.* v. *Beers et al.*, 61 U. S. 393-401; *New Jersey Steam Navigation Co.* v. *Merchants Bank*, 6 How. 344, 392; *The Perseverance*, 19 Fed. Cas. 308; *Pacific Surety Co.* v. *Leatham etc. Co.* 151 Fed. 440, 442, 443; *Amer. & Eng. Encyc. of Law*, Vol. I. p. 660 and cases cited).

It is obvious that a purely personal stipulation to join in the appointment of arbitrators in

New York and to submit to them controversies for determination does not come within the narrow confines of this rule.

The fact that the arbitration agreement is included in a charter-party does not alter the nature of the act agreed to be done. A charter-party while it is characterized generally as a maritime contract is often a bundle of agreements, many of which have no relation to a maritime service and which are unenforceable in an admiralty court. Not only such independent agreements but also agreements of a mixed nature in which are involved some ingredients of a maritime nature are not within the admiralty jurisdiction. In *Plummer* v. *Webb*, 4 Mason 380, Mr. Justice Story laid down the principle, approved by this Court in *Grant* v. *Poillon*, 61 U. S. 162, 168, that "a contract of a *special nature* is not cognizable in the admiralty merely because the consideration of the contract is maritime". In the first mentioned case Justice Story in refusing to assume jurisdiction in admiralty to enforce a covenant for "good tender and parental usage" in an otherwise maritime contract pointed out, in so far as the agreement here under consideration is involved, the judicially accepted line between contracts that were and those which were not enforceable in admiralty. The eminent jurist there said at page 894 (19 Fed. Cas.):

> "I cannot say that the whole contract is here of a maritime nature. There is *mixed up in it obligations ex contractu not necessarily maritime;* and so far the contract is of a special nature. In cases of a mixed nature it is not a sufficient foundation for

admiralty jurisdiction that there are involved *some ingredients of a maritime nature.* The substance of the whole contract must be maritime. If the doctrine of the *courts of common law,* which denies admiralty jurisdiction over *mariners' contracts where there is a special agreement,* had been confined to cases where the consideration for such maritime services was not money but of a *peculiar nature not capable of adjustment in pecunia numerata,* or resting in *special executory stipulations,* there would have been little objection to it. See *Howe* v. *Napier,* 4 Burrows 1944; *De Lorio* v. *Bolt* (Case No. 3766); *Harden* v. *Gordon* (id. 6,047). If a contract were to convey a farm or a house, or to build a mill, or to furnish machines, or to weave cloth, *in consideration of maritime services,* it would hardly be contended that a court of admiralty had authority to *enforce these special stipulations.*"

It has accordingly been held that contracts of a special or personal nature incorporated in a charter-party or other contract normally maritime are not subject to or enforceable in the admiralty but must be enforced if at all in the courts of common law.

The Ada (*C.C.A.*) 250 Fed. Rep. 194 195;

Pacific Surety Co. v. *Leatham* (*C.C.A.*) 151 Fed. 440, at 442-43 and cases there cited.

On any hypothesis no reason exists for holding an agreement to arbitrate to be maritime. Not only does its enforcement not call for the application of any maritime principle but also in the event that a controversy arose as to fraud or mistake in its inception only the common law courts (as distinguished from the admiralty courts) could assume jurisdiction of the controversy or grant any relief in reference thereto.

For the foregoing reasons petitioner contended before the Court of Appeals that the enforcement of this agreement through the application of the state remedy did not deny to the admiralty court its exclusive jurisdiction; that petitioner was not there seeking the adjudication of the alleged rights under the principal contract or the return of the overpaid charter hire, but the specific performance of a contractual right which made *available the agreed remedy* for that purpose, namely, *arbitration*. The court did not deny the soundness of this contention but in answering it said: (Trascript of record page 96)

> "Counsel for the charterers (petitioner) urges that a remedy provided in the state court *that makes available a remedy* for the settlement of a maritime controversy through the specific performance of an agreement for that remedy is not an infringement of the jurisdiction of the admiralty court; that the charterers are not seeking a judgment for overpaid charter hire, etc., but an order decreeing that the arbitration proceed in the manner provided by the contract. Even if we assume

that the proceeding is practically one to enforce specific performance of the arbitration clause of the contract an order granting such relief presupposes the existence of a controversy the subject matter of which is within the jurisdiction of the court granting the order. It would be idle ceremony for the courts to grant an order requiring specific performance of an agreement to arbitrate a dispute where upon an examination of the papers presented as the basis for such an order it is apparent that the subject matter of the controversy which the charterers desire submitted to arbitration clearly arose under maritime clauses in a charter party over which the arbitrators could not assume jurisdiction even if arbitration was ordered."

Inasmuch as the court assumed that petitioner was not seeking a judgment for the return of the alleged overpaid charter hire there was, of course, no controversy before it as to the "liability or non-liability of the owner to the charterer". The remedy sought being one to enforce the arbitration agreement, the only possible controversies that could arise over its enforcement, with the exception of the one as to constitutionality, would be as to whether the agreement was made and if made valid, and if valid whether it was broad enough to cover the disputes in question. All of these controversies are unquestionably within the jurisdiction of the state court. That these are the only questions before the court and that they are questions over which it has jurisdiction was declared in *Berkowitz* v.

Arib & Houlberg, supra. In that case the arbitration statute was assailed as "abridging the general jurisdiction of the Supreme Court". In holding this contention unsound the Court said in part at p. 274:

> "The Supreme Court does not lose a power inherent in its very being when it loses power to aid in the repudiation of a contract concluded without fraud or error, whereby differences are to be settled *without resort to litigation.* For the right to nullify is substituted *the duty to enforce.* Contending parties have contracted that the merits of their controversy shall be conditioned upon the report of arbitrators, as upon any other extrinsic fact, which agreement might prescribe. *Whether they have so contracted is a question which the court must still determine for itself.* * * * *If the contract has not been made or is invalid the court* will proceed as in any other case *to a determination of the merits.*"

If it be assumed that the court's inference as to its lack of jurisdiction arose from its acceptance of respondent's theory that the agreement to arbitrate is maritime because it is included in a charter-party and the controversies to be arbitrated are maritime, then we submit, for the reasons pointed out above, that the court's conclusion is clearly erronous. If the subject matter of the agreement to arbitrate is the subject matter of the controversies that may thereafter arise in reference to the breach of other covenants of the principal contract, the

measure of damages for the breach of the arbitration agreement in an action for damages would not be damages resulting from the breach of that agreement but would be the loss sustained by reason of the alleged breach of the covenants in controversy, an obvious absurdity.

But even if the agreement to arbitrate may be considered maritime, the equity court has jurisdiction to compel its specific performance. The principle is of course well settled that courts of admiralty have no general jurisdiction to administer relief as courts of equity, and cannot compel specific performance. That fact, however, does not deprive the equity courts of their power to decree it in a proper case whether maritime or otherwise. *The Eclipse,* 135 U. S. 599, 608; *Andrews* v. *Essex Ins. Co.*, 1 Fed. Cas 885, 888; *Meyer* v. *Pacific Mail S. S. Co.* 58 Fed. 923; *Dean* v. *Bates,* 7 Fed. Cas. 299, 300; *Kynock* v. *S. C. Ives,* 14 Fed. Cas. 888, 891.

The rule is concisely stated in the last cited case at p. 891, as follows:

> "Courts of admiralty have no general jurisdiction to administer relief as courts of equity. *If a maritime contract is broken* the admiralty concurrent with courts of law can only give damages for the breach of it, *whereas the chancery may compel the party in some cases to specific performance.*
>
> *A court of admiralty has no more power to decree such specific performance than* it has to set aside a contract for fraud or correct a mistake or decree the execution of a trust. *These are matters properly subject to the cognizance of courts of equity.*"

As we have previously pointed out the courts have never denied that the agreement created a right. Its value, however, is one of convenience to which no pecuniary value can be assigned. (In *Re Red Cross Line,* 277 Fed. Rep. 853) Because its economic and convenience value cannot be pecuniarly determined and the *damages* for its breach are therefore nominal, specific performance is the only adequate remedy. "Jurisdiction exists that rights may be maintained". We may assume that jurisdiction is lodged in the admiralty court for no other purpose. When jurisdiction is invoked as here, that a right may not be maintained, it is invoked to defeat the end and purpose for which jurisdiction exists For these reasons we believe that the principle announced in *Steamboat Company* v. *Chase,* 16 Wall. 522, is as truly applicable to the facts in this case as in that one. In that case the admiralty jurisdiction was invoked to defeat the recovery of damages by an administrator through a state created remedy for the death of his decedent occasioned by the negligence of the defendant on navigable waters. The Court there said at p. 530:

> "When no remedy exists for an injury in the admiralty courts the fact that such courts exist and exercise jurisdiction in other causes of action, leaves the state court as free to exercise jurisdiction in respect to an injury not cognizable in the admiralty as if the admiralty courts were unknown to the constitution and had no existence in our jurisprudence."

We do not believe that this Court will on the plea now put forward that it preserve from infringement the jurisdiction of the admiralty court, sanction the extension of the ancient policy that was thought to forbid the specific performance of an arbitration agreement so as to prevent that result in the forum of a state, when that state by legislative enactment has repudiated the existence of such a public policy. The supposed policy itself is one of the common law, not of the admiralty. It has been followed in the admiralty as in the state courts in deference to precedent, although with frequent protest. (*U. S. Asphalt Refining Co.* v *Trinidad Lake Petroleum Co.*, 222 Fed. Rep. 1006; *Atlantic Fruit Co.* v. *Red Cross Line*, 276 Fed. Rep. 319.) As was well said by the court in *Berkowitz* v. *Arbib & Houlberg* (*supra*) at p. 276:

> "The ancient rule, with its exceptions and refinements was criticised by many judges as anomalous and unjust (*D. & H. C. Co.* v. *Pa. Coal Co.* (*supra*); *Fudeckor* v. *Guardian Mutual Life Ins. Co.*, 62 N. Y. 392,399; *U. S. Asphalt Refining Co.* v. *Trinidad Lake Petroleum Co.*, 222 Fed. Rep. 1006, and cases there cited). It was followed with frequent protest in deference to early precedent. Its hold even upon the common law was hesitating and feeble."

To hold that this old policy is of such potent force that it prevents the enforcement of the agreement in a jurisdiction that has repudiated it, because the rule still exists in a court that has

concurrent jurisdiction of the controversies agreed to be arbitrated, is unnecessary and we submit without warrant.

Further the public policy of the admiralty court is not petrified. And as was said by Circuit Judge Hough, in the concurring opinion in *Aktieselskabet Korn, etc.*, v. *Rederiaktiebologet, etc.*, 250 Fed. Rep. 935, at 939, "Whether the rule * * * can long survive historical and logical criticism" is doubtful. But even if it should be abandoned by the Court or if the Congress by legislative enactment should repudiate it, the admiralty court is still powerless specifically to enforce the agreement and this remedy must be sought in the equity court. And in view of the fact that specific performance is a remedy belonging peculiarly to the equity courts, it is at least doubtful whether Congress could constitutionally extend the jurisdiction of the admiralty court so as to confer this power upon it.

The concluding sentence of the extract from the opinion of the New York Court of Appeals in the case at bar as quoted above to the effect that the arbitrators could not assume jurisdiction to determine the liability or non-liability of the owner to the petitioner because the controversy arose under maritime clauses in a charter party, is an unprecedented and we submit an unwarranted extension of the provisions conferring jurisdiction on the Admiralty Court, and, if true, will effectually bar the enforcement of an award by arbitrators under any circumstances. No inhibition exists in those provisions against parties' settling maritime controversies except by litigation in the Admiralty Court. Clearly the "exclusive" jurisdiction ex-

ists *only* where there is *a litigation in court* of maritime controversies. If arbitrators do not have jurisdiction to determine the rights and liabilities in such disputes, their award in reference thereto would be void and unenforceable The Admiralty Courts, however, have always considered as valid, and upheld, the awards in such controversies. Indeed the Admiralty Courts have gone much further. In *Toledo Steamship Co.* v. *Zenith Transportation Company*, 184 Fed. Rep. 391 (C. C. A.) one of the parties to the arbitration agreement sought to avoid the effect of the agreement after a decision of liability had been made by the arbitrators but before damages had been awarded. The court however refused to entertain the plea that the arbitration had been a nullity and obliged the parties to rest content with the relief thereby afforded. And no cause could have been more maritime than the one there involved for it was a case of collision damages resulting from the collision of two ships on navigable waters.

Whether a court intervenes to decree the specific performance of the agreement or not, the jurisdiction of the arbitrators, that is the power to hear and determine, results from the agreement of the parties, not from the mandate of the court, and hence their jurisdiction is as valid in the one case as in the other.

The fact that a forum other than the admiralty may be called upon to determine the *event* and *measure* of *damages* for the *breach of maritime covenants* has never been held to be an objection to the enforcement of a non-maritime contract in the state court. Indeed the direct opposite was inferentially held in *Pacific Surety Co.* v. *Lea-*

tham &c. Co. (C. C. A.) 141 Fed. 440. In that case a charter-party contained covenants substantially similar to the one herein. It also recited that a bond should be furnished for the performance of these covenants. The bond was furnished and subsequently the bonding company was proceeded against by libel in the admiralty court for the alleged breach of the covenants. A decree was entered against the bonding company, which on appeal was reversed and the libel dismissed for want of jurisdiction. In holding that a suit on the bond for the breach of the terms of the charter-party could not be maintained in the admiralty court the Court said in part at page 443:

> "True the obligations of the surety hinges upon the breach of a contract (maritime) on the part of the principal, and the charter-party is thus brought in by way of evidence of the breach, and of liability to respond in damages under the covenants of the bond. The direct subject-matter of the suit is the covenant to pay such damages, which neither involves maritime service nor maritime transactions; *and we are of the opinion that the mere fact that the event and measure of liability are referable to the charter-party* does not make the bond a maritime agreement nor its obligations maritime in the jurisdictional sense."

Surely if the admiralty court has no jurisdiction to enforce such an agreement, it can not be reasonably contended that the state court may not do so merely because in enforcing it

the question of liability or non-liability under the charter-party will be determined by a forum other than the admiralty.

That it is not the policy of the law to compel parties *to litigate disputes* maritime or otherwise was the conclusion of the Supreme Court of Oregon in the recent case of *West* v. *Kozer*, 206 Pacific Reporter, 542. In that case the Court held that the provisions of the Oregon Workmen's Compensation law goverened as to maritime torts where the parties in effect had adopted that law as a part of their contract.

The Court while basing its determination to a large extent upon the expression of this Court in *Grant Smith-Porter Ship Co.* v. *Rhode*, 42 Sup. Ct. 187 was unable to find in *Knickerbocker Ice Co.* v. *Stewart* 253 U. S. 149 any objection to the enforcement of an *agreement* substituting other rights and remedies for those furnished by the Admiralty court. Speaking of the latter case the Court said:

> "The Supreme Court of the United States held in substance that it was not competent for Congress to subtract from the admiralty jurisdiction conferred by the Constitution.
>
> We do not understand the Court as holding that an employer and employee may not *as between themselves contract* to take out a form of accident insurance which shall be the measure of the liability of the employer in case of accident and *precludes the necessity of litigation* in the federal court * * *".
>
> It is not the policy of the law international or otherwise *to pull parties into court* by the hair *when they have agreed between themselves upon a method of keeping out.*"

Arbitration is a quick economic and common-sense method of settling controversies without resorting to wasteful litigation. It is an ancient *common law* method of enforcing rights and redressing wrongs (*Corpus Juris* Vol. 5 p. 16; Blackstone Commentaries, Vol. 3, p. 14). There is no valid reason why parties should not settle their controversies, maritime or non-maritime in this manner. Neither is there any reason why their agreement to do so should not be enforced.

The old rule prohibiting the enforcement of the agreement was supposed to have had its inception in the jealousy of the courts of their jurisdiction. "A more unworthy genesis," as remarked by Judge Hough in *U. S. Asphalt Co.* v. *Trinidad etc.*, (*supra*) "cannot be imagined" Certainly no such policy can be said to exist today, when the crowded condition of the court calendars delays for years the hearing of a case, which fact in many instances results in a denial of justice.

We believe that this Court may take judicial notice of the trend of legislation to abolish the old rule. If the large class of disputes, growing out of charter parties, or other contracts normally maritime cannot be submitted to or determined by arbitrators the value of this legislation, especially in seaboard states, is greatly minimized. Furthermore in such states contracts that in the main are non-maritime, either contain many maritime covenants or incorporate by reference charter-parties or ocean bills of lading. A common example of this class of contracts is found in contracts for the sale of coal, phosphate sulphur or other minerals that in

addition to the ordinary covenants and warranties of sale contain also the usual maritime covenants in reference to loading, carriage, and other covenants usually found in charter-parties. These contracts almost invariably contain arbitration agreements similar to the one herein. The disputes growing out of such contracts may be maritime or non-maritime or both. Indeed the settlement of one of two disputes may be dependent on the determination of another; one maritime, the other non-maritime. The legal problems arising from an attempt to define with accuracy the disputes arising under such contracts that in their determination involve no maritime question, would probably precipitate as much litigation as the agreement was designed to avoid. We do not believe that this Court will find any warrant in the provisions conferring jurisdiction on the admiralty court for the justification of any such result.

POINT II.

The Court of Appeals of the State of New York erred in holding that, because the subject of the controversy existing between the parties is one pertaining to navigation, therefore the question of liability or non-liability of the vessels chartered owner is within the exclusive jurisdiction of the Courts of admiralty.

The respondent contended in the state court that the statute created a new remedy for the

violation of the covenants in the principal contract and that petitioner was seeking in the state court the return of the overpaid charter hire. Respondent sought to justify this contention with a statement of the New York Court of Appeals in the opinion rendered by it in *Berkowitz* v. *Arbib & Houlberg, (supra)* to the effect that *arbitration* is a *remedial procedure* and that the statute had made two remedies *available* to redress the violation of a contract where formerly there was one.

This same contention was made in the United States District Court after the suit had been removed to that court in order to sustain the allegation that it was one that involved a controversy in which the value of the matter in dispute was at least of the jurisdictional amount of $3000.00. That court however in remanding the suit to the state court held that it was not one for the return of the overpaid charter hire, but one to enforce the agreement to arbitrate and inasmuch as that agreement had no determinable pecuniary value the jurisdictional amount was not involved (*Red Cross Line*, 277 Fed. Rep 853). In this connection the Court said in part at page 856:

> "* * * The overpaid charter hire is not here the matter in dispute but solely the right to specific performance of the agreement to arbitrate. If the arbitration is ordered the function of the court so far as the proceeding instituted goes ceases."

The Court of Appeals did not rule specifically on this question. It did not however, although

the opinion of the District Court was indirectly a part of the record and incorporated in petitioner's brief, deny that the conclusion of the Federal Court was correct. Instead, it accepted the contention of petitioner to that effect as pointed out herein in Point I, but concluded that to enforce the agreement in the state court would deny to the admiralty court its exclusive jurisdiction.

Even if it be assumed, however, for the purpose of argument that the Court of Appeals accepted respondent's theory, viz; that the order directing the arbitration to proceed and the proceedings had before the arbitrators were a mere part of the remedy provided in the state court and that the resulting award was a judgment of that court from which an appeal lay as in any other case, the whole proceeding is nothing more than an ordinary suit for damages for the breach of a contract the amount of which by agreement is determined by arbitrators. In other words, if the court assumed that from the time when it took jurisdiction to enforce the arbitration agreement it retained it until the award was made a judgment and that the remedy sought was in fact one to recover the loss sustained by reason of the alleged breach of the covenants of the principal contract, it does not differ from any other remedy *in personam* except that the court enforces by an auxiliary process authorized by the state statute the agreement that the merits of the controversy and judgment thereon shall be conditioned upon the report of arbitrators just as without the statute the court might condition its judgment upon any other extrinsic fact that agreement has prescribed.

The Court of Appeals in its opinion in the case at bar after quoting the provisions conferring jurisdiction on the admiralty court and discussing the nature of the questions raised by the controversy, concludes:

> "* * * the subject of the controversy existing between the parties is clearly one pertaining to navigation, consequently the *question of liability or non-liability of the owner to the charterer* is within the *exclusive* jurisdiction of the courts of admiralty."

We submit that the conclusion of the court as thus announced discloses clearly that it has misapprehended the effect of the provisions conferring jurisdiction of maritime causes on the admiralty court. The grant of judicial power in cases of admiralty and maritime jurisdiction has never been construed as excluding the jurisdiction of the common-law courts over civil causes simply because the admiralty court has unquestionable jurisdiction over those causes. The affect in the grant of jurisdiction of the clause "saving to suitors in all cases the right of a common-law remedy where the common-law is competent to give it" has always been held to confer concurrent jurisdiction on the state courts to furnish a common-law remedy in civil cases of maritime origin (*New Jersey Steam Navigation Co.* v. *Merchants Bank*, 6 How. 344, 390; *Propeller Genesee Chief* v. *Fitzkirk*, 12 How. 443, 448; *The Belfast*, 7 Wall 622, 644; *Leon* v. *Galceran*, 11 Wall, 185, 187-188; *Schoonmaker* v. *Gilmore*, 102 U. S. 118; *Insurance Co.* v. *Durham*, 11 Wall 1-32; *Manchester* vs. *Massachusetts*,

138 U. S. 262). The jurisdiction of the state court being concurrent to this extent the "*question of liability or non-liability*" in maritime controversies is of course not within the "*exclusive*" jurisdiction of the admiralty court. The question to be determined is not, therefore, as was stated by the Court of Appeals "whether or not the controversy between the parties is one of admiralty or of state jurisdiction" but, in the event that the remedy in question is one to redress the violation of the principal contract, whether that remedy falls within the saving clause, saving to suitors in all cases the right of a common-law remedy when the common-law is competent to give it. This determination calls for the construction of a federal statute in relation to the remedy in question and this Court of course is no more bound by the determination of the state court to the effect that the remedy is not embraced within the saving clause, than it would be if the state court had held the reverse. And it is, we submit, particularly important that the determination of the Court of Appeals be reviewed because it is predicated upon what we believe to be an unwarranted and erroneous premise as to jurisdiction.

The earlier cases in which the courts were called upon to determine the meaning of this clause were cases in which state statutes had attempted to confer upon the State courts the peculiar remedy of *a proceeding in rem* for causes cognizable in the admiralty court either *in rem* or *in personam*. Such were the cases of *The Moses Taylor*, 4 Wall 411; *Hine* v. *Trevor*, 4 Wall 555; *The Belfast*, 7 Wall 624; *The Lottawana*, 21 Wall 558; *The J. E. Rumble*, 148, U. S. 1; *The Glide*, 167 U. S. 606. In these

cases it was pointed out that the violation of the exclusive jurisdiction of the Admiralty resulted from the attempt to provide in the state court for *maritime* causes a remedy peculiarly in the province of the Admiralty Court.

The first attempt however to chrystalize by definition the proceedings that do and that do not violate the exclusive jurisdiction of the admiralty is found in *Knapp Stout & Co.* v. *McCaffrey*, 177 U. S. 638. In that case McCaffrey had a half raft of lumber in his possession at Boston Bay, Illinois, which was part of a raftage that he had towed under a *concededly maritime* contract from Stillwater, Minnesota, to St. Louis. His towage charges being unpaid McCaffrey filed a bill in equity in the Illinois State Court to foreclose his lien, the *local law* allowing the enforcement of possessory liens in equity. A decree was entered in his favor for the sum of $3,643.17, which was affirmed by the Supreme Court of the State. This court in reviewing the determination of the state court stated in effect on page 644 that inasmuch as the proceeding taken was not a common-law action, but a suit in equity, the real question before it was "whether the proceeding taken is within the exception 'of saving to suitors in all cases the right of a common-law remedy where the common-law is competent to give it.'" The court then pointed out that the reservation was not of an action at common-law but a common-law remedy; that a remedy does not necessarily imply an action; but that it is the means employed to enforce a right or redress an injury. The court concluded that the proceeding taken was therefore within the saving clause and laid down the principle in re-

ference to the exclusive jurisdiction of the admiralty court on page 648 as follows:

> "The *true distinction* between such *proceedings* as are and such as are not invasions of the *exclusive admiralty jurisdiction* is this: If the cause of action be cognizable in admiralty and the suit be *in rem* against the thing itself though a monition be also issued to the owner the proceeding is essentially one in admiralty. If, upon the other hand, the cause of action be not one of which a court of admiralty has jurisdiction *or if the suit be in personam against an individual defendant* with an auxiliary attachment against a particular thing or against the property of the defendant in general it is *essentially* a proceeding *according to the course of the common law* and within the saving clause * * *."

In *Leon* v. *Galceran*, 11 Wall. 185, it was held that a suit for wages on a mariner's contract in the State Court and the concurrent issuance of a writ of sequestration authorized by the Louisiana statute against a vessel as security to respond to a judgment if recovered against her owner, was not an invasion of the exclusive admiralty jurisdiction but that the suit was one *in personam* and within the saving clause. Likewise in *Rounds* v. *Cloveport Foundry*, 237 U. S. 303 the institution of a suit *in personam* in the state court on a maritime contract and the concurrent issuance therein of a process of attachment under the Kentucky Statute was held not to violate this exclusive jurisdiction.

It is clear therefore that, in a suit on a maritime contract against a *person* to recover a *money judgment*, the mere issuance of an auxiliary process, *authorized by a state statute* in *aid* of the suit is not an infringement of the exclusive jurisdiction of Admiralty, but is a suit *in personam* and within the saving clause.

It is to be noted that the cases above referred to are those in which *remedies only* were considered and likewise remedies for the enforcement only of rights and obligations recognized and enforceable under the Maritime Law. The principle to be drawn from them is we believe accurately stated in *Corpus Juris* Vol. 1, p. 1253 as follows:

> "The clause saving to suitors a common law remedy where the common-law is competent to give it *is intended to save the remedy or right of action in those courts which proceed according to the course of the common-law as distinguished from Admiralty proceedings* and the words 'common-law remedy' do not necessarily imply an action or remedy in a common-law court *but are equivalent to the means employed to enforce a right or redress an injury.*"

See also to the the same effect *Johnson* v. *Westerfield* 143 Ky. 10-14; *Chase* v. *American Steamboat Co.* 9 R. I. 419, aff'd. 16 Wall 522.

To apply this principle to the remedy here sought for, even if it be considered as one for the return of the overpaid charter hire, it is a remedy clearly within the scope of the saving clause. The proceeding is instituted by the ser-

vice of process on a person; it is to redress the alleged breach of the covenants of the charter party; it ends in an ordinary money judgment against a person, enforceable in the usual manner. It differs from an ordinary suit *in personam* only in that there is issued during the proceeding a supplemental process, authorized by the statute to enforce specifically the agreement that judgment shall be conditioned upon the report of arbitrators.

We are not unmindful of the decisions of this Court in *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, and *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, much relied upon and quoted from by the respondent in the State Court. The statement of the court in the Jensen case that "the remedy which the compensation statute attempts to give is of a character wholly unknown to the common-law incapable of enforcement by the ordinary *process* of *any court*" can have no application to the remedy here sought, even if considered as one to recover the overpaid charter hire. Aside from this fact, however, we believe that the Court's remarks are not to be considered apart from the statute that it then had under consideration. Not only did that statute create a remedy, as defined by the court above, but *ex proprio vigore* it *substituted statutory rights* and *liabilities*, for those recognized and for which a remedy existed, in the admiralty court and made them enforceable exclusively by the remedy thus created. As stated by this Court in the *Knickerbocker* case, *supra*, "The state enactment prescribes *exclusive rights and liabilities*, undertakes to secure their observance by *heavy penalties* and *onerous conditions* and provides novel remedies

incapable of enforcement by an admiralty court."

The distinction is obvious between such a statute and the one here under consideration, which merely makes available an old equity process in a new class of cases in a suit to enforce contractual rights.

Furthermore, as we read the case of *Grant Smith-Porter Ship Co.* vs. *Rhode* 42 Sup. Ct. 157, this Court found no violation of the exclusive admiralty jurisdiction in the enforcement of an *agreement* providing exclusive rights and liabilities and the remedy for their enforcement, although by such enforcement a party was deprived of the rights and remedies which he otherwise would have had in the admiralty court. *A fortiori* it would seem that no violation would result in enforcing an *agreed* method of determining the merits of a controversy in a suit for the enforcement of contractual rights and liabilities

The question therefore in the last analysis resolves itself into this: Does the issuance of a supplementary process, specifically to enforce a term of the contract upon which suit is brought in a court of concurrent jurisdiction violate the exclusive jurisdiction of the admiralty, merely because in a suit on the contract in its forum a policy exists against such specific enforcement? If the *policy* of the Admiralty Court is to control the policy of the state forum in the application of a remedy in a cause of concurrent jurisdiction, it is a distinct change of the general rule that the policy of the forum determines in matters of remedies. It is well known that the policies of the Federal Court and the New York courts differ in reference to the enforcement of an agreement exempting a carrier from liability for negli-

gence. It has, however, never been suggested that in a case of concurrent jurisdiction the policy of the state would not control in its forum. Neither do we believe that this Court will find in the provisions conferring jurisdiction on the admiralty court any justification for extending a rule of policy that in the nature of things belongs peculiarly and exclusively to the forum.

POINT III.

The Court of Appeals of the State of New York erred in holding that to enforce the arbitration agreement in the State Court would "destroy a rule of uniformity".

The Court of Appeals cited as authority for the above holding the cases of *Southern Pacific Company* v. *Jensen* (*supra*) and *Knickerbocker Ice Company* v. *Stewart* (*supra*). We submit that the court has drawn from these cases an unwarranted conclusion.

We start with the conceded premise that the sole function of the statute is to furnish a remedy. A remedy in a state court for a maritime cause however has never been condemned on the theory that it destroyed uniformity. The saving of a common-law remedy not only saved the remedies of the several states within their several jurisdictions existing at the time of the passage of the Judiciary Act (which it has never been supposed were uniform) but also, as has been pointed out, statutory remedies subsequently enacted for maritime contracts or torts, so long as they did not attempt to parallel the peculiar

remedies in the admiralty established for such cases (*Leon* v. *Galceran* (*supra*); *Knapp Stout Co.* v. *McCaffrey* (*supra*); *Rounds* v. *Cloveport Foundry* (*supra*); *Chase* v. *American Steamboat Company* (*supra*).

We read in the Jensen and Stewart cases no overturning of this rule. The violation of the uniformity rule referred to in those cases resulted from the attempts made to substitute statutory *rights and liabilities* for rights and liabilities definitely fixed by the maritime law. As was said by the court in the Knickerbocker case at page 159 referring to its holding in the Jensen case:

> "Thus we distinctly approved the view that the original saving clause conferred *no substantive rights* and did not authorize the states to do so. It referred only to *remedies* and to the extent specified permitted continued enforcement by the State Court of rights and obligations founded on maritime law."

That the destruction of uniformity condemned in the Jensen case resulted from the attempt made by the state to legislate *rights and liabilities* into maritime matters where the subject of legislation "admits and requires uniformity of *regulation*," was specifically pointed out by this Court at page 217, as follows:

> "If New York can *subject* foreign ships coming into her ports *to such obligations as those enforced by her compensation statute* other states may do likewise. The necessary

> consequence would be the destruction of the very uniformity in respect to maritime matters which the constitution was designed to establish and freedom of navigation between the states and foreign countries would be seriously hampered and impeded."

Again this Court in the recent case of *State Industrial Commission* v. *Nordenholt Corporation,* (42 Sup. Ct. Rep. 473) in discussing the uniformity rule, referring to the Jensen case said at page 475:

> "In Jensen's case *rights and liabilities* were definitely fixed by *maritime rules whose uniformity was essential.* With these the *local law came into conflict.*"

Thus, as we read the Jensen and Stewart cases, as well as other cases in which the uniformity rule has been applied, the statutes there considered were condemned as offending the rule because they wiped out rights secured by the maritime law and undertook to impose new liabilities; the result was an interference with the proper harmony and uniformity of the maritime law in its international and inter-state relations The statute here under consideration, however, does not impair or change the rights or liabilities existing under the maritime law or any law. Neither does it *ex proprio vigore* impose a new and compulsory remedy for their enforcement. Instead of depriving parties of rights under the maritime law, it merely makes available an auxiliary remedy in the State Court in the enforcement of contractual rights. It is the agreement

of the parties, not the mandate of the statute, that brings about the relinquishment of the usual methods for determining the merits of the dispute. If parties wish the usual method for determining merits to govern, they are not compelled to contract for a different one. If they do so contract that contract is enforced as any other contract would be. We can read in no decided case of this Court any suggestion that the uniformity rule may be invoked to deprive a party of a contractual right or shield another from the performance of his contractual obligation.

That a similar remedy may not exist in all the states for the enforcement of a right has as we have shown never been an objection to its enforcement. *Knapp Stout Co.* v. *McCaffrey* (*supra*) illustrates the point. It was conceded in that case that the remedy there invoked was one sanctioned *only by the local law*, but that fact was not considered as an objection to its use.

The fact that the admiralty court may refuse to adopt a part of the state practice in its courts on the ground that to do so would introduce confusion and result in a lack of uniformity in the practice in the federal forum is of course no reason for condeming the remedy sought in the state court. The admiralty court presumably may exclude much of a state court practice on that ground. The statutory remedy of a Bill of Particulars is illustrative. Although the admiralty court refuses to apply such a remedy in it forum because to do so would result in a lack of uniformity of practice (*Foster* v. *Compagnie Francaise de Navigation a Vapeur*, 219 Fed. 351), it has never been suggested that this fact would be a reason for excluding its use in a case

of concurrent jurisdiction in the state court. We presume that the admiralty jurisdiction concedes as much independence to the state jurisdiction in this respect as it exacts for itself.

It seems to us that the state court's independence of practice in a cause of concurrent jurisdiction was definitely conceded in *Chelentes* v. *Luckenbach S. S. Co.*, 247 U. S. 372. In that case the court pointed out at page 379 that the *substantive* rights under a maritime contract "must be the same *in every court*, maritime or common law," but concludes:

> "The only difference between a proceeding in the one court or the other would be that the *remedy would be regulated by the lex fori.*"

From whatever angle therefore the decision of the Court of Appeals may be viewed, it is supported neither by principle nor precedent. And in view of the confusion and uncertainty as well as injustice that may result from allowing such a decision to stand, we submit that the same should be reversed.

HOMER L. LOOMIS,
Counsel for Petitioner

HOMER L. LOOMIS,
REGINALD B. WILLIAMS,
Of Counsel.

APPENDIX.

CHAP. 275.

AN ACT in relation to arbitration, constituting chapter seventy-two of the consolidated laws.

Became a law April 19, 1920, with the approval of the Governor.

Passed, three-fifths being present.

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

CHAPTER 72 OF THE CONSOLIDATED LAWS.

ARBITRATION LAW.

Article 1. Short title (§1).

2. General provisions (§§2-6).

3. Application of certain sections of the code of civil procedure and repeal of certain other provisions thereof (§§7-9).

4. Time of taking effect (§10).

ARTICLE 1.

SHORT TITLE.

Section 1. Short title.

Section 1. Short title. This chapter shall be known as the "Arbitration Law."

ARTICLE 2.

General Provisions.

Section 2. Validity of arbitration agreements

3. Remedy in case of default.

4. Provision in case of failure to name arbitrator or umpire.

5. Stay of proceedings brought in violation of an arbitration agreement or submission.

6. Applications to be heard as motions.

§ 2. VALIDITY OF ARBITRATION AGREEMENTS. A provision in a written contract to settle by arbitration a controversy thereafter arising between the parties to the contract, or a submission hereafter entered into of an existing controversy to arbitration pursuant to title eight of chapter seventeen of the code of civil procedure, shall be valid, enforcible and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§ 3. REMEDY IN CASE OF DEFAULT. A party aggrieved by the failure, neglect or refusal of another to perform under a contract or submission providing for arbitration, described in section two hereof, may petition the supreme court, or a judge thereof, for an order directing that such arbitration proceed in the manner provided for in such contract or submission. Eight days' notice in writing of such application shall be served upon the party in default. Service

thereof shall be made in the manner provided by law for personal service of a summons. The court, or a judge thereof, shall hear the parties, and upon being satisfied that the making of the contract or submission or the failure to comply therewith is not in issue, the court, or the judge thereof, hearing such application, shall make an order directing the parties to proceed to arbitration in accordance with the terms of the contract or submission. If the making of the contract or submission or the default be in issue, the court, or the judge thereof, shall proceed summarily to the trial thereof. If no jury trial be demanded by either party, the court, or the judge thereof, shall hear and determine such issue. Where such an issue is raised, any party may, on or before the return day of the notice of application, demand a jury trial of such issue, and if such demand be made, the court, or the judge thereof, shall make an order referring the issue or issues to a jury in the manner provided by law for referring to a jury issues in an equity action. If the jury find that no written contract providing for arbitration was made or submission entered into, as the case may be, or that there is no default, the proceeding shall be dismissed. If the jury find that a written contract providing for arbitration was made or submission was entered into and there is a default in the performance thereof, the court, or the judge thereof, shall make an order summarily directing the parties to the contract or submission to proceed with the arbitration in accordance with the terms thereof.

§ 4. PROVISION IN CASE OF FAILURE TO NAME ARBITRATOR OR UMPIRE. If, in

the contract for arbitration or in the submission, described in section two, provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then, upon application by either party to the controversy, the supreme court, or a judge thereof, shall desig nate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said contract or submission with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided, the arbitration shall be by a single arbitrator.

§ 5. STAY OF PROCEEDINGS BROUGHT IN VIOLATION OF AN ARBITRATION AGREEMENT OR SUBMISSION. If any suit or proceeding be brought upon any issue otherwise referable to arbitration under a contract or submission described in section two, the supreme court, or a judge thereof, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under a contract containing a provision for arbitration or under a submission described in section two, shall stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement.

§ 6. APPLICATIONS TO BE HEARD AS MOTIONS. Any application to the court, or a

judge thereof, hereinunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

ARTICLE 3.

Application of Certain Sections of the Code of Civil Procedure and Repeal and Amendment of Certain Other Provisions Thereof.

Section 7. Repeal of provisions of code of civil procedure.

8. Application of certain sections of code of civil procedure.

9. Amendment of certain section of code of civil procedure.

§ 7. REPEAL OF PROVISIONS OF CODE OF CIVIL PROCEDURE. Sections twenty three hundred and eighty-three, twenty-three hundred and eighty-four and twenty-three hundred and eighty-five of chapter seventeen, title eight of the code of civil procedure are hereby repealed.

§ 8. APPLICATION OF CERTAIN SECTIONS OF CODE OF CIVIL PROCEDURE. The provisions of Sections twenty-three hundred and sixty-five to twenty-three hundred and eighty-six of the code of civil procedure, both inclusive, except sections twenty-three hundred and eighty-three, twenty-three hundred and eighty-four and twenty-three hundred and

eighty-five, so far as practicable and consistent with this chapter, shall apply to an arbitration agreement under this chapter, and for such purpose the arbitration agreement shall be deemed a submission to arbitration. Wherever in such sections reference is made to the court specified in the submission, the supreme court shall have jurisdiction of the subject matter if no court be specified in the arbitration agreement.

§ 9. AMENDMENT OF CERTAIN SECTION OF CODE OF CIVIL PROCEDURE Section twenty-three hundred and eighty-two of the code of civil procedure is hereby amended to read as follows:

§ 2382. Where a party dies after making a submission either as prescribed in this title or otherwise, if the submission contains a stipulation, authorizing the entry of a judgment upon the award, the award may be confirmed, vacated, modified, or corrected, upon the application of, or upon notice to, his executor or administrator, or a temporary administrator of his estate; or, where it relates to real property, his heir or devisee, who has succeeded to his interest in the real property. Where a committee of the property, or of the person, of a party to a submission is appointed, the award may be confirmed, vacated, modified, or corrected, upon the application of, or notice to, a committee of the property; but not otherwise. In a case specified in this section, a judge of the court may make an order, extending the time within which notice of a motion to vacate, modify, or correct the award must be served. Upon confirming an award, where a

party has died since it was filed or delivered, the court must enter judgment in the name of the original party; and the proceedings thereupon are the same, as where a party dies after a verdict.

ARTICLE 4.

Time of Taking Effect.

Section 10. Time of taking effect.

§ 10. Time of taking effect. This act shall take effect immediately.

Chap. 14.

AN ACT to amend the arbitration law, in relation to arbitration agreements.

Became a law March 1, 1921, with the approval of the Governor.

Passed, three-fifths being present.

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Section two of chapter two hundred and seventy-five of the laws of nineteen hundred and twenty, entitled "An Act in relation to arbitration, constituting chapter seventy-two of the consolidated laws," is hereby amended to read as follows:

§ 2. VALIDITY OF ARBITRATION AGREEMENTS. A provision in a written contract to settle by arbitration a controversy thereafter arising between the parties to the contract, or a submission hereafter entered into of an existing controversy to arbitration pursuant to title eight of chapter seventeen of the code of civil procedure, or article eighty-three of the civil practice act shall be valid, enforcible and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§ 2. Section eight of such chapter is hereby amended to read as follows:

§ 8. APPLICATION OF CERTAIN SECTIONS OF CODE OF CIVIL PROCEDURE AND THE CIVIL PRACTCE ACT. The provisions of sections twenty-three hundred and sixty-five to twenty-three hundred and eighty-six of the code of civil procedure, both inclusive, except sections twenty-three hundred and eighty-three, twenty-three hundred and eighty-four and twenty-three hundred and eighty-five, and the corresponding sections of the civil practice act, namely sections fourteen hundred and ten to fourteen hundred and thirty-one, both inclusive, except sections fourteen hundred and twenty-eight, fourteen hundred and twenty-nine and fourteen hundred and thirty, so far as practicable and consistent with this chapter, shall apply to an arbitration agreement under this chapter, and for such purposes the arbitration agreement shall be deemed a submission to arbitration. Wherever in such sections reference is

made to the court specified in the submission, the supreme court shall have jurisdiction of the subject matter, if no court be specified in the arbitration agreement.

§ 3. This act shall take effect April fifteenth, nineteen hundred and twenty-one.

FILED
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WM. R. STANSB
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 112

RED CROSS LINE

Petitioner,

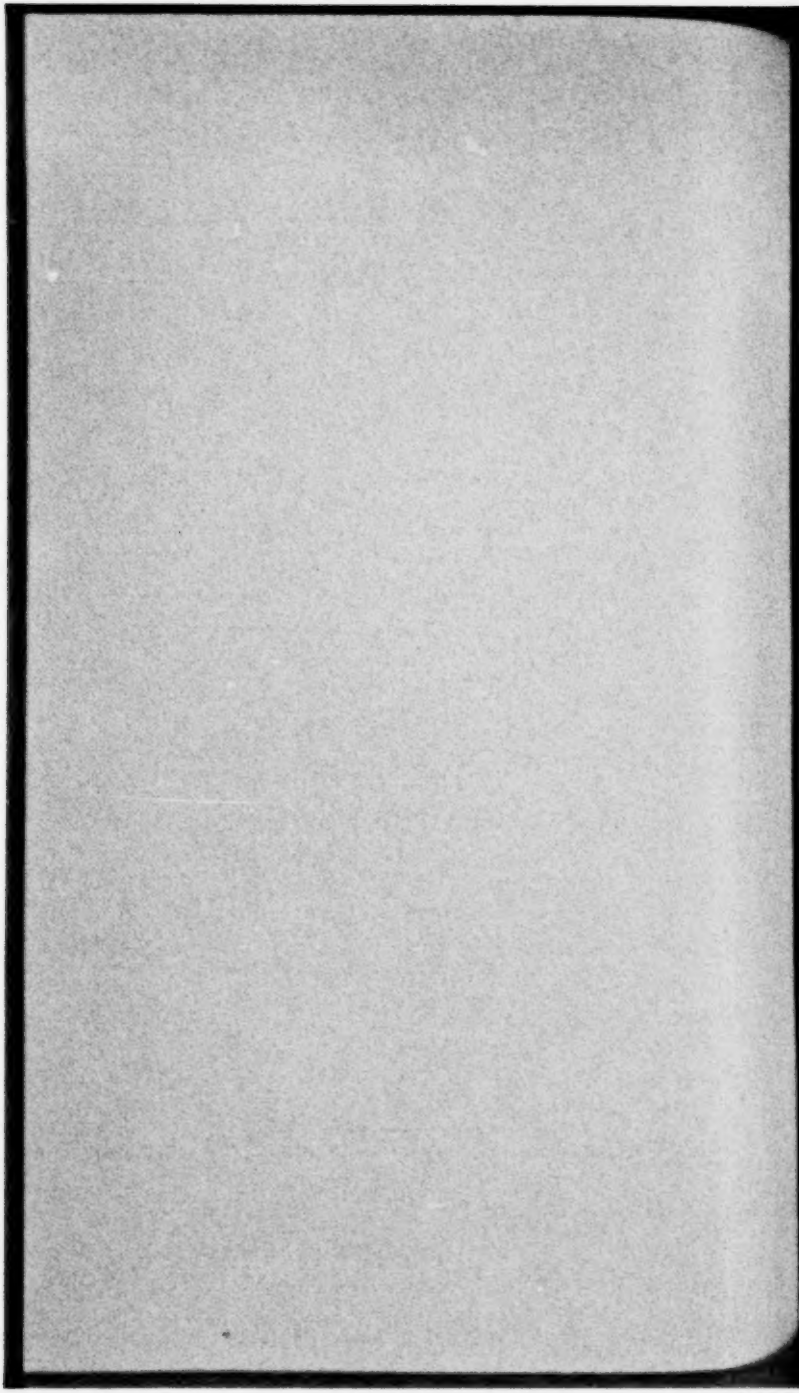
AGAINST

ATLANTIC FRUIT COMPANY,

Respondent.

BRIEF FOR PETITIONER ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

HOMER L. LOOMIS,
Counsel for Petitioner.



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POINT I. PAGE

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Supreme Court of the United States

RED CROSS LINE,
Petitioner,

AGAINST

ATLANTIC FRUIT COMPANY,
Respondent.

Statement of the Case.

This case comes to this Court on a writ of certiorari issued by this Court on December 2, 1922, to review an order and judgment of the Supreme Court of the State of New York, County of New York, dated respectively June 5, 1922, and July 26, 1922, (pp. 33 and 34)* and entered on an order and judgment of the Court of Appeals of the State of New York (p. 32) reversing an order and judgment of the Appellate Division of the Supreme Court of the State of New York (pp. 30, 31). This latter order and judgment had affirmed an order of the Supreme Court, New York County, directing the respondent, At-

*All references noted herein, unless otherwise described, relate to the Transcript of Record filed in this Court.

lantic Fruit Company, to proceed to arbitration as it had theretofore by contract agreed to do (pp. 1, 2).

STATEMENT OF FACTS.

Provisions of Arbitration Statute and History of Petition for Arbitration.

In April, 1920, the Legislature of the State of New York by Chapter 275 of the Laws of 1920 enacted a law hereinafter referred to as the Arbitration Statute. In Section 2 of said statute it is declared that agreements to arbitrate "shall be valid, enforceable, and irrevocable, save upon such grounds as exist at law and equity for the revocation of any contract." In Section 3 a method is provided whereby to facilitate the specific performance of such agreements. A copy of the Arbitration Statute as amended by the laws of 1921 appears as an appendix to this brief (*infra*, pp. 53-61).*

On or about May 27, 1920, the petitioner, Red Cross Line, a British corporation, pursuant to said statute, filed a petition in the Supreme Court, New York County, praying for an order directing the respondent herein, Atlantic Fruit Company, a Delaware corporation, to join with petitioner in an arbitration in accordance with an arbitration agreement contained in a charter party executed in New York to which they were parties and under which a controversy had arisen.

---

*A copy of this statute is also to be found attached to the Petition on which the Writ of Certiorari herein was granted.

Prior to a hearing had on said petition, however, the Appellate Division of said Supreme Court held that the said arbitration statute was not applicable to agreements executed prior to the enactment of the statute. Inasmuch as petitioner's agreement had been executed prior to the enactment of the arbitration statute petitioner withdrew and held in abeyance its petition pending the decision of this question by the Court of Appeals of the State of New York. Thereafter the said Court of Appeals reversed the holding of the said Appellate Division and thereupon the petitioner on April 12, 1921, filed its petition anew (pp. 3-12).

Allegations of Petition to Enforce Arbitration.

Briefly stated the petition set forth (pp. 3-6):

That on November 28, 1919, respondent had chartered to petitioner the steamship *Runa* for one round trip between New York and a safe Atlantic port in British North America at a hire of $25,000.00 per month; that among other provisions in said contract it was provided that the captain should prosecute the voyage with the utmost dispatch, that in the event of damages preventing the working of the steamer for 24 hours at sea payment of hire should cease until the vessel was again in an efficient condition to resume her journey and that any loss of time occasioned by repairs to hulls or machinery or by deficiency of crew or stores, should be for respondent's account; that it was further provided by Article 23 of said contract as follows (p. 29, fol. 69):

"23. That should any dispute arise between owners and charterers the matter in

dispute shall be referred to three persons in New York, one to be appointed by each of the parties hereto and the third by the two so chosen; their decision or that of any two of them shall be final and for the purpose of enforcing any award this agreement shall be made a rule of the court."

That thereafter the said steamship entered upon the performance of said contract and on December 6th cleared the port of New York bound for St. Johns, Newfoundland; that the captain did not prosecute the voyage with the utmost dispatch; that when within 100 miles of his destination, the master turned the steamer around and went into the Azores where she was laid up for 21 days, thereby consuming 39 days in the trip made to St. Johns instead of the 8 days ordinarily required; that petitioner, being in ignorance of the true facts until the return of the steamer to New York and in order to prevent her premature withdrawal for non-payment of hire and otherwise to protect its rights, paid to respondent under protest hire and disbursements at the times and in the amounts stipulated in the contract; that by reason of these facts petitioner had overpaid to respondent hire and disbursements in the sum of $35,256.96, of which sum petitioner demanded the repayment; that respondent had refused and disputed its liability to repay the same; that a dispute having thus arisen petitioner pursuant to said Article 23 called upon respondent to arbitrate the same; and that respondent had refused and still refuses to arbitrate.

The petition concluded with a prayer for the relief hereinbefore described.

Removal to Federal Court and Remand.

After petitioner had served and filed its petition in the State Court respondent removed the same to the United States District Court for the Southern District of New York on the ground that it was a civil suit between an alien and a non-resident wherein the amount in controversy was over $3,000 and on the further ground that it was a suit arising under the constitution or laws of the United States (pp. 18-19). Petitioner appearing specially in the District Court moved to remand the suit to the State Court and respondent made a counter motion to dismiss the same for lack of jurisdiction. The District Court denied the motion to dismiss and remanded the suit (p. 22) on the ground that it was not a suit in which the jurisdictional amount of $3,000.00, as required by the removal statute, was involved. *In Re Red Cross Line*, 277 Fed. Rep. 853.

Theory of Respondent's Defense.

The respondent thereafter filed an answer to the petition in the State Court (pp. 12-16) in which, among other things, it admitted the agreement to arbitrate and that it had refused so to do. Respondent alleged, however, as a complete defense, that the dispute set forth in the petition, being one arising out of a charter-party, was a maritime dispute and a cause over which the Admiralty Court has exclusive jurisdiction, except in so far as a common law remedy is saved; that the State Statute "provided (to quote respondent's language, p. 14, fol. 30) an

additional remedy unknown to the common law for the settlement or adjustment of disputes by compelling parties to arbitrate them if they have agreed to do so"; and that, in so far as the statute was intended to apply to agreements to arbitrate disputes arising over matters within the maritime jurisdiction, said statute was contrary to Article III, Section 2, of the Federal Constitution and Sections 24 and 256 of the Judicial Code conferring jurisdiction over such disputes on the Admiralty Court.

Thereafter a hearing was had on said petition before Mr. Justice Burr at a Special Term of the Supreme Court of the State of New York, who subsequently handed down a memorandum opinion (p. 22, fols. 57-58) granting the petition and entered the order heretofore referred to directing respondent to proceed to arbitration in accordance with its contract (pp. 1-2). From said order an appeal was thereafter carried to the Appellate Division of the Supreme Court, First Department, where without opinion the order was unanimously affirmed.

Thereafter on appeal carried to the Court of Appeals of the State of New York, the order of the Appellate Division was reversed and the proceedings were ordered to be dismissed.

Opinion of State Court of Appeals.

The Court of Appeals in the opinion accompanying the order of reversal and the dismissal of the proceedings reasoned in brief (pp. 36-40), that, the charter-party agreement, in which the arbitration agreement was incorporated, being one for the use of a steamship and the trans-

portation of cargo from the port of New York to a foreign port, and the controversy being one pertaining to navigation, "the question of liability or non-liability of the owner to the charterer is within the exclusive jurisdiction of the courts of admiralty" and to use the remedy provided by the statute to enforce specifically the arbitration agreement would be an idle proceeding because the arbitrators could not assume jurisdiction of a maritime controversy (p. 40, fol. 97); and that "to sustain the arbitration agreement and enforce the same in the state court would deny to the federal court the exclusive jurisdiction with which Congress had clothed it and likewise destroy a rule of uniformity."

Statement of Question Involved.

The question, therefore, in brief presented to this court for review and determination is as follows: Is a State statute that provides for use in the courts of that state a method specifically to enforce arbitration agreements unconstitutional, as an infringement of the maritime jurisdiction, when applied to an arbitration agreement contained in a charter-party where the controversies to be arbitrated arise subsequent to the making of the agreement and are such as are cognizable in an Admiralty Court?

Reasons Why Decision of State Court of Appeals is Erroneous.

The decision of this question in the affirmative by the Court of Appeals, it is submitted, is erroneous and unwarranted, whether the State remedy be considered (1) a remedy to enforce only the specific agreement to arbitrate or (2) a remedy to enforce the ultimate rights asserted in the controversy.

If the first of these two alternatives be true the State remedy enforces an agreement that is collateral to and independent of the other obligations of the charter-party and is itself non-maritime in nature. Its enforcement by the state court would not deny to the Federal admiralty court its exclusive jurisdiction merely because such enforcement would result in the adjustment of maritime disputes without the admiralty court. And even were the agreement to arbitrate to be treated as maritime its specific performance pursuant to the decree of an equity court would not infringe the admiralty jurisdiction, which lacks the power to compel such performance.

On the other hand, to consider the second of the alternatives above noted, if the remedy, although in terms one to enforce the agreement to arbitrate is, as respondent contended, one provided to enforce the ultimate rights asserted in the controversy, it is not a remedy that infringes the exclusive jurisdiction of the admiralty court because in that event the suit in which the remedy is invoked is a common law suit *in personam* for damages for breach of contract in which the court by a mere auxiliary process authorized by the state statute enforces

an agreement that the merits of the controversy and the amount of damages in such suit shall be conditioned upon the report of arbitrators as upon any other extrinsic fact which agreement might prescribe. A judgment *in personam* is entered upon this report and the proceeding is therefore "essentially a proceeding according to the course of the common law" and within the saving clause of the judicial code, saving to suitors a common law remedy for a maritime cause.

Assignments of Error.

The petitioner in its application made to this Court for the Writ of Certiorari granted herein assigned the following errors on the part of the State Court of Appeals:

1. The Court of Appeals of the State of New York erred in holding that to enforce in the state courts the parties' agreement to arbitrate contained in a charter-party would deny to the Federal courts the exclusive jurisdiction with which Congress had clothed them.

2. The Court of Appeals of the State of New York erred in holding that because the subject of the controversy existing between the parties is one pertaining to navigation, therefore the question of liability or non-liability of the vessel's chartered owner is within the exclusive jurisdiction of the Court of Admiralty.

3. The Court of Appeals erred in holding that to enforce the arbitration agreement in the State Court would "destroy a rule of uniformity."

ARGUMENT.

POINT I.

The statutory remedy being one for the enforcement of a non-maritime contract, its application in the State Court does not deny to the Federal Courts their exclusive jurisdiction. And even if the arbitration clause of a charter-party should be considered of a maritime nature, the foregoing proposition is equally true both because of the Admiralty's admitted want of equity jurisdiction and because of the well settled concurrent jurisdiction of the Courts of common law.

A.—The agreement to arbitrate alone is the subject of the statutory remedy.

Petitioner brought its petition for the specific performance of the arbitration agreement in the equity part of the Supreme Court, New York County, invoking for that purpose the quick and efficient procedure provided in the Arbitration Statute. Section 3 of the statute provides in terms a "remedy" for the "party aggrieved" to enforce "a contract or submission providing for arbitration" on the "failure, neglect or refusal of another to perform".

In so far as there has been any judicial interpretation of Section 3 of said statute, it is consonant with the *expressed* intent of the act. It has been judicially declared not only that the said section "*prescribed the procedure for the enforcement of the contract*"* (*Matter of Berko-*

*All italics appearing herein unless otherwise noted are the writer's.

witz v. *Arbib & Houlberg*, 230 N. Y. 261, 269) but also that the "*act is intended to compel specific performance of contracts for arbitration*" and in the absence of such a contract it provides no remedy whatever (*Matter of Division, 132 etc.*, 196 App. Div. 206, 212).

The courts have never denied that the agreement to arbitrate created a right. In *Matter of Berkowitz* v. *Arbib & Houlberg*, (*supra*), the suggestion was made that prior to the enactment of the Statute such an agreement did not create a right but the court held this view to be erroneous and said at page 271:

> "Public policy was thought to forbid that the promise *be specifically performed.* Public policy *did not forbid an award of damages if it was broken* (*Haggert* v. *Morgan*, 5 N. Y. 422, 427; *Finucane Co.* v. *Board of Education*, 190 N. Y. 76, 83)."

And as was pointed out by this Court in *Hamilton* v. *Home Ins. Co.*, 137 U. S. 370, at page 385, if the agreement to arbitrate is so phrased that it cannot be considered as a condition precedent to an action on the principal contract, it is "well settled that the agreement for submitting the amount to arbitrators is collateral and independent and * * * will support a separate action"; language clearly recognizing that the agreement created a substantive right.

In view of the express provision of the statute and the judicial declaration made in reference thereto to the effect that the remedy furnished is one to enforce the contractual right to arbitra-

tion, the application of the statutory remedy to the independent contract to arbitrate incorporated in a charter-party does not infringe the jurisdiction of the admiralty court; at least not unless this independent contract is maritime and subject to the admiralty jurisdiction.

B.—The agreement to arbitrate is not a maritime agreement and is not within the jurisdiction of the admiralty court.

The doctrine that the "essential requisite of a contract to bring it within the admiralty jurisdiction" and the "true criterion" for its determination is "an undertaking for the performance of maritime services" has been so often laid down that it must now be treated as settled. (*North Pacific S. S. Co.* v. *Hall Bros. Co.*, 249 U. S. 119, 125; *Peoples Ferry Co. etc.* v. *Beers et al.*, 61 U. S. 393, 401; *New Jersey Steam Navigation Co.* v. *Merchants Bank*, 6 How. 344, 392; *The Perseverance*, Blatchf. & H. 385, 19 Fed. Cas. 307, 308; *Pacific Surety Co.* v. *Leatham etc. Co.*, 151 Fed. 440, 442-443; *Amer. & Eng. Encyc. of Law*, Vol. I, p. 660 and cases cited.)

It is obvious that a purely personal stipulation to join in the appointment of arbitrators in New York and to submit to them controversies for determination does not come within the narrow confines of this rule. The subject matter of this covenant relating as it does to the submission of controversies to arbitrators "neither involves maritime services nor maritime transactions".

The fact that the arbitration agreement is included in a charter-party does not alter the na-

ture of the act or acts agreed to be done. A charter-party, while it is characterized generally as a maritime contract, is to speak more accurately a series of agreements, some of which very often have no relation to a maritime service and are unenforceable in an admiralty court. The agreement to arbitrate is obviously entirely independent of and unrelated to the other covenants in the charter-party. It is like the clause contained in the charter-party herein and numbered 26 (p. 29, f. 69) and regularly found in all charter-parties stipulating the commission to be paid to the broker effecting the charter; surrounded by covenants of a maritime nature but itself not maritime and therefore not enforceable in an admiralty court.

Brown v. *West Hartlepool Steam Nav. Co.*, 112 Fed. Rep. 1018;
Richard v. *Holman*, 123 Fed. Rep. 734, 736-737;
Richard v. *Hogarth*, 94 Fed. Rep. 684;
Taylor v. *Weir*, 110 Fed. Rep. 1005;
The Thames, 10 Fed. Rep. 848.

In *Plummer* v. *Webb*, 4 Mason, 380, 19 Fed. Cas. 891, Mr. Justice Story laid down the principle, approved by this Court in *Grant* v. *Poillon*, 61 U. S. 162, 168, that "a contract of a *special nature* is not cognizable in the admiralty merely because the consideration of the contract is maritime". In the first mentioned case Mr. Justice Story in refusing to assume jurisdiction in admiralty to enforce a covenant for "good tender and parental usage" in an otherwise maritime

contract pointed out, in so far as the agreement here under consideration is involved, the judicially accepted line between those contracts which are and those which are not enforceable in admiralty. He said at page 894 (19 Fed. Cas.):

> "I cannot say that the whole contract is here of a maritime nature. There is *mixed up in it obligations ex contractu not necessarily maritime;* and so far the contract is of a special nature. In cases of a mixed nature it is not a sufficient foundation for admiralty jurisdiction that there are involved *some ingredients of a maritime nature.* The substance of the whole contract must be maritime. If the doctrine of the *courts of common law,* which denies admiralty jurisdiction over *mariners' contracts where there is a special agreement,* had been confined to cases where the consideration for such maritime services was not money but of a *peculiar nature not capable of adjustment in pecunia numerata,* or resting in *special executory stipulations,* there would have been little objection to it. See *Howe* v. *Napier,* 4 Burrows 1944; *De Lorio* v. *Bolt* (Case No. 3766); *Harden* v. *Gordon* (id. 6,047). If a contract were to convey a farm or a house, or to build a mill, or to furnish machines, or to weave cloth, *in consideration of maritime services,* it would hardly be contended that a court of admiralty had authority to *enforce these special stipulations.*"

It has accordingly been held that contracts of a special or personal nature incorporated in a charter-party or other contract normally maritime, even although capable of adjustment "in

pecunia numerata" are not subject to or enforceable in the admiralty but must be enforced if at all in the courts of common law.

> *The Ada* (C. C. A) 250 Fed. Rep. 194-195;
>
> *Pacific Surety Co.* v. *Leatham* (C. C. A.) 151 Fed. 440, at 442-43 and the cases there cited.

On any hypothesis no reason exists for holding an agreement to arbitrate to be maritime. Its enforcement no more calls for the application of any maritime principle than would a controversy as to fraud or mistake in its inception, where only the common law courts (as distinguished from the admiralty courts) could assume jurisdiction of the controversy or grant any relief in reference thereto.

For the foregoing reasons petitioner contended before the Court of Appeals that the enforcement of this agreement through the application of the state remedy did not deny to the admiralty court its exclusive jurisdiction; that petitioner was not there seeking the adjudication of the ultimate rights arising under the principal contract or the return of the overpaid charter hire, but the specific performance of a contractual right which made *available the agreed remedy* for that purpose, namely, *arbitration.* The Court did not deny the soundness of this contention, but in answering it said (Transcript of record, page 40):

> "Counsel for the charterers (petitioner) urges that a remedy provided in the state court *that makes available a remedy* for the

settlement of a maritime controversy through the specific performance of an agreement for that remedy is not an infringement of the jurisdiction of the admiralty court; that the charterers are not seeking a judgment for overpaid charter hire, etc., but an order decreeing that the arbitration proceed in the manner provided by the contract. Even if we assume that the proceeding is practically one to enforce specific performance of the arbitration clause of the contract an order granting such relief presupposes the existence of a controversy the subject matter of which is within the jurisdiction of the court granting the order. It would be idle ceremony for the courts to grant an order requiring specific performance of an agreement to arbitrate a dispute where upon an examination of the papers presented as the basis for such an order it is apparent that the subject matter of the controversy which the charterers desire submitted to arbitration clearly arose under maritime clauses in a charter party over which the arbitrators could not assume jurisdiction even if arbitration was ordered."

Inasmuch as it would seem that the court assumed that petitioner was not seeking a judgment for the return of the alleged overpaid charter hire there was, of course, no controversy before it as to the "liability or non-liability of the owner to the charterer". The remedy sought being one to enforce the arbitration agreement, the only possible controversies that could arise over its enforcement, with the exception of the one as to constitutionality, would be whether the agreement was made and, if made, valid, and if valid whether it was broad enough to cover the

disputes that had arisen. All of these controversies are unquestionably within the jurisdiction of the state court. That these are the only questions before the court and that they are questions over which it has jurisdiction was declared in *Matter of Berkowitz* v. *Arbib & Houlberg, supra.* In that case the arbitration statute was assailed as "abridging the general jurisdiction of the Supreme Court". In holding this contention unsound the court said in part at p. 274:

> "The Supreme Court does not lose a power inherent in its very being when it loses power to aid in the repudiation of a contract concluded without fraud or error, whereby differences are to be settled *without resort to litigation.* For the right to nullify is substituted *the duty to enforce.* Contending parties have contracted that the merits of their controversy shall be conditioned upon the report of arbitrators, as upon any other extrinsic fact, which agreement might prescribe. *Whether they have so contracted is a question which the court must still determine for itself* * * * *If the contract has not been made or is invalid the court* will proceed as in any other case to *a determination of the merits.*"

If it be assumed that the court's inference as to its lack of jurisdiction arose from its acceptance of a theory put forward by the respondent that the agreement to arbitrate is maritime because it is included in a charter-party and the controversies to be arbitrated are maritime, then we submit that, for the reasons pointed out above, the court's conclusion is clearly erroneous.

If the subject-matter of the agreement to arbitrate is the subject-matter of the various and varying controversies that may thereafter arise by reason of the asserted breach of other covenants of the principal contract, the measure of damages for the breach of the arbitration agreement in an action at law would not be the loss resulting from the breach of that agreement but rather the loss suffered by reason of the alleged breach of the other covenants of the contract; an obvious absurdity.

The case of *Munson* v. *Straits of Dover Steamship Company*, 99 Fed. 787, cited by respondent in its answer to the petition for the writ of certiorari herein as authority for the contention that the arbitration agreement is maritime, is without force. The question was neither raised by counsel nor considered by the court. As a matter of fact the suit was dismissed as not sustainable in admiralty because the damages for the breach of the arbitration agreement are only nominal. The fact that a suit may be dismissed for one reason does not of course exclude the existence of other reasons that would justify a dismissal.

C.—But even if the agreement to arbitrate should be considered maritime, the equity court has jurisdiction to compel its specific performance.

The principle is of course well settled that courts of admiralty have no general jurisdiction to administer relief as courts of equity, and cannot compel specific performance. That fact,

however, does not deprive the equity courts of their power to decree it in a proper case whether maritime or otherwise. *The Eclipse*, 135 U. S. 599, 608; *Andrews* v. *Essex Ins. Co.*, 3 Mason 6, 1 Fed. Cas. 885, 888; *Meyer* v. *Pacific Mail S. S. Co.*, 58 Fed 923; *Dean* v. *Bates*, 2 Woodb. & M. 87, 7 Fed. Cas. 299, 300; *Kynock* v. *S. C. Ives*, Newb. 205, 14 Fed. Cas. 888, 891.

The rule is concisely stated in the last cited case at p. 891, as follows:

> "Courts of admiralty have no general jurisdiction to administer relief as courts of equity. *If a maritime contract is broken* the admiralty concurrent with courts of law can only give damages for the breach of it, *whereas the chancery may compel the party in some cases to specific performance.*
>
> *A court of admiralty has no more power to decree such specific performance than* it has to set aside a contract for fraud or correct a mistake or decree the execution of a trust. *These are matters properly* subject to the cognizance of courts of equity."

As we have previously pointed out the courts have never denied that the arbitration covenant created a right. Its value, however, is one of convenience to which no pecuniary value can be assigned. (*In Re Red Cross Line*, 277 Fed. Rep. 853.) Because its economic and convenience value cannot be pecuniarily determined and the *damages* for its breach are therefore nominal, specific performance is the only adequate remedy. "Jurisdiction exists that rights may be maintained". We may assume that jurisdiction is lodged in the admiralty court for no other purpose. When jurisdiction is invoked as here, that a right may not be maintained, it is in-

voked to defeat the end and purpose for which jurisdiction exists. For these reasons we believe that the principle announced in *Steamboat Company* v. *Chase*, 16 Wall. 522, is as truly applicable to the facts in this case as to the facts in that one. In that case the admiralty jurisdiction was invoked to defeat the recovery of damages by an administrator through a state-created remedy for the death of his decedent occasioned by the negligence of the defendant on navigable waters. The Court there said at p. 530:

> "When no remedy exists for an injury in the admiralty courts the fact that such courts exist and exercise jurisdiction in other causes of action leaves the state court as free to exercise jurisdiction in respect to an injury not cognizable in the admiralty as if the admiralty courts were unknown to the constitution and had no existence in our jurisprudence."

D.—Settlement of maritime controversies by arbitration is not inhibited by the provision conferring jurisdiction of maritime causes on admiralty courts.

The concluding sentence of the extract from the opinion of the New York Court of Appeals in the case at bar as quoted above to the effect that the arbitrators could not assume jurisdiction to determine the liability or non-liability of the owner to the petitioner because the controversy arose under maritime clauses in a charter-party, is an unprecedented and we submit an unwarranted extension of the provisions conferring jurisdiction on the Admiralty Court, and, if sound, would under all circumstances effectually

bar the enforcement of an award made by arbitrators. No inhibition exists in the provisions conferring jurisdiction on the admiralty court against parties' settling maritime controversies through methods other than litigation had in that court. Clearly the "exclusive" jurisdiction exists *only* where there is *a litigation in court* of maritime controversies.

In this connection it is to be remembered as is pointed out in *Berry* v. *Donovan & Sons*, 120 Me. 457, 458-459, 115 Atlantic Rep. 250, at p. 251, "that the congress in its exception did not save to suitors a remedy in the common law courts but saved to them a common law remedy. (*The Moses Taylor*, 4 Wall. 411, 431.) The distinction is the difference between *an action* and *a remedy;* a remedy does not necessarily imply an action. *Knapp & Co.* v. *McCaffrey*, 177 U. S. 638. A remedy upon the authority of Bouvier is the means employed to enforce a right or redress an injury. Remedies are usually by action but by no means necessarily so." Arbitration while not an action was nevertheless a well known remedy at common law for the settlement of controversies. See 5 *Corpus Juris*, p. 16; 3 *Blackstone Commentaries*, p. 16; and *Bured* v. *Odem*, 9 Ala. 755, 766. It is submitted that the conclusion of the Court of Appeals that arbitrators cannot assume jurisdiction of a maritime dispute is clearly erroneous.

Furthermore if arbitrators do not have jurisdiction to determine the rights and liabilities in such disputes, their award in reference thereto would be void and unenforceable. The Admiralty Courts, like the common law courts, however, have always considered as valid, and

upheld, the awards made in such controversies. Indeed the Admiralty Courts have gone much further. In *Toledo Steamship Co.* v. *Zenith Transportation Company,* 184 Fed. Rep. 391 (C. C. A.) one of the parties to the arbitration agreement sought to avoid the effect of the agreement after a decision of liability had been made by the arbitrators but before damages had been awarded. The court however refused to entertain the plea that the arbitration had been a nullity and obliged the parties to rest content with the relief thereby afforded. And no cause could have been more maritime than the one there involved for it was a case growing out of the collision of two ships on navigable waters.

Whether a court intervenes to decree the specific performance of the agreement or it is carried out without its intervention, the jurisdiction of the arbitrators, that is the power to hear and determine, results from the agreement of the parties, not from the mandate of the court, and hence it would seem that their *jurisdiction* is as valid in the one case as in the other.

E.—The state court in enforcing an agreement does not deny to the admiralty court its exclusive jurisdiction merely because by reason of such enforcement a forum other than the admiralty may determine the event and measure of damages for the breach of a maritime contract.

The fact that a forum other than the admiralty may be called upon to determine the *event* and *measure of damages* for the *breach of maritime covenants* has never been held to be an objection to the enforcement of a con-

tract in the state court. Indeed the direct opposite was inferentially held in *Pacific Surety Co.* v. *Leatham &c.* (C. C. A.) 141 Fed. 440. In that case a charter-party contained covenants substantially similar to the one involved herein. It also recited that a bond should be furnished for the performance of these covenants. The bond was furnished and subsequently the bonding company was proceeded against by libel in the admiralty court for the alleged breach of the covenants. A decree was entered against the bonding company, which on appeal was reversed and the libel dismissed for want of jurisdiction. In holding that a suit on the bond for the breach of the terms of the charter-party could not be maintained in the admiralty court the Court said in part at page 443:

> "True the obligation of the surety hinges upon the breach of a contract (maritime) on the part of the principal, and the charter-party is thus brought in by way of evidence of the breach, and of liability to respond in damages under the covenants of the bond. *The direct subject-matter of the suit is the covenant to pay such damages, which neither involves maritime services nor maritime transactions; and we are of the opinion that the mere fact that the event and measure of liability are referable to the charter-party* does not make the bond a maritime agreement nor its obligations maritime in the jurisdiction sense."

Surely if the admiralty court has no jurisdiction to enforce such an agreement, it cannot be reasonably contended that the state court may

not do so merely because by reason of its enforcement the question of liability or non-liability under the charter-party will be determined by a forum other than the admiralty.

That a party by contract may waive not only his rights under the maritime law, but also the right to resort to the admiralty court for the adjustment of his disputes it seems to us was in effect determined by this Court in *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U. S. 469, 478.

We do not believe that it is the policy of the law to compel parties *to litigate disputes* maritime or otherwise. This was the conclusion of the Supreme Court of Oregon in the recent case of *West* v. *Kozer*, 104 Ore. 94, 99-100, 206 Pacific Reporter, 542. In that case the court held that the provisions of the Oregon Workmen's Compensation law governed as to the recovery of damages for a maritime tort where the parties in effect had voluntarily adopted that law as a part of their contract. The court while basing its determination to a large extent upon the expression of this Court in *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U. S. 469, 478, was unable to find in *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, any objection to the enforcement of an *agreement* substituting other rights and remedies for those furnished by the admiralty court. Speaking of the latter case the court said at pp. 99-100:

> "The Supreme Court of the United States held in substance that it was not competent for Congress to substract from the admiralty jurisdiction conferred by the Constitution
> * * *.

> We do not understand the Court as holding that an employer and employee may not *as between themselves* contract to take out a form of accident insurance which shall be the measure of the liability of the employer in case of accident and *preclude the necessity of litigation in the federal courts* * * *.
>
> It is not the policy of the law international or otherwise *to pull parties into court by the hair when they have agreed between themselves upon a method of keeping out* * * *."

Arbitration is a quick economic and commonsense method of settling controversies without resorting to wasteful litigation. And as we have pointed out it is an ancient *common law* method of determining rights and redressing wrongs. There is no valid reason why parties should not settle their controversies, maritime or non-maritime, in this manner. Neither is there any reason why their agreement to do so should not be enforced.

F.—So-called Public Policy rule not to be extended.

We do not believe that this Court will, at the instance of a party confessedly seeking to avoid its contract to arbitrate, sanction the extension of the ancient policy that was thought to forbid the specific performance of such an agreement so as to prevent that result in the forum of a state, when that state by legislative enactment has repudiated the existence of such a policy. That the admiralty court cannot enforce such an agreement is not germane to the point. The

supposed policy itself is one of the common law; not of the admiralty. It has been followed in the admiralty as in the state courts in deference to early precedent, although with freqeunt protest. (*U. S. Asphalt Refining Co.* v. *Trinidad Lake Petroleum Co.*, 222 Fed. Rep. 1006; *Atlantic Fruit Co.* v. *Red Cross Line*, 276 Fed. Rep. 319.) As was well said by the court in *Matter of Berkowitz* v. *Arbib & Houlberg* (*supra*) at p. 276:

> "The ancient rule, with its exceptions and refinements was criticized by many judges as anomalous and unjust (*D. & H. C. Co.* v. *Pa. Coal Co.* (*supra*); *Fudeckor* v. *Guardian Mutual Life Ins. Co.*, 62 N. Y. 392, 399; *U. S. Asphalt Refining Co.* v. *Trinidad Lake Petroleum Co.*, 222 Fed. Rep. 1006, and cases there cited). It was followed with frequent protest in deference to early precedent. Its hold even upon the common law was hesitating and feeble."

To hold that this old policy is of such potent force that it prevents the enforcement of an arbitration agreement in a jurisdiction that has repudiated the policy, simply because it may be said still to exist in a court that has concurrent jurisdiction of the controversies agreed to be arbitrated, is, we submit, unnecessary and uncalled for.

The old rule that prevented the enforcement of the agreement on the theory that it was against public policy as an ouster of the jurisdiction of the court has now been repudiated and abandoned by the courts of England in which it originated. As was said by Lord Dunedin speaking for the court in *Atlantic Shipping & Trading*

Co. v. *Louis Dreyfus & Co.*, Lloyd's List Law Reports, Vol. 10, p. 707, a very recent case in the House of Lords, in which the antiquated policy was again invoked:

> "Under the old law an agreement to refer disputes arising under a contract to arbitration was often asserted to be bad as an ousting of the jurisdiction of the courts, but that position was finally abandoned in *Scott* v. *Avery* (1856) 5 H. L. C. 811. As I read that case it can no longer be said that the jurisdiction of the court is ousted by such an agreement; *on the contrary the jurisdiction of the court is invoked in order to enforce it;* and there is nothing wrong in persons' agreeing that their disputes should be decided by arbitration."

The rule was supposed to have had its inception in the jealousy of the courts of their jurisdiction. "A more unworthy genesis," as remarked by Judge Hough in *U. S. Asphalt Co.* v. *Trinidad etc.* (*supra*) "cannot be imagined".

Further the policy of the admiralty court is not petrified. As was said in the concurring opinion rendered in *Aktieselskabet Korn, etc.* v. *Rederiaktiebolaget, etc.*, 250 Fed. Rep. 935, at 939, "Whether the rule * * * can long survive historical and logical criticism" is doubtful. But even if it should be abandoned by the admiralty or if the Congress by legislative enactment should repudiate and abolish it, the admiralty court is still powerless specifically to enforce the agreement and this remedy must be sought in the equity court. And in view of the fact that specific performance is a remedy

belonging peculiarly to the equity courts, it is at least doubtful whether Congress could constitutionally extend the jurisdiction of the admiralty court so as to confer this power upon it.

G.—Effect of holding that arbitrators cannot assume jurisdiction of maritime disputes.

We believe that this Court may take judicial notice of the trend of legislation to abolish the old rule in this country. If the large class of disputes growing out of charter parties or other contracts principally maritime cannot be submitted to or determined by arbitrators the value of this legislation, especially in seaboard states, is greatly minimized, and a large and important part of the public will be denied the benefit of this legislation.

Furthermore contracts that in the main are non-maritime, often either contain covenants of a maritime nature or incorporate by reference charter-parties or ocean bills of lading. Common examples of this class of agreements are found in contracts for the sale of minerals and other commodities to be shipped abroad that so provide for ocean transportation. Other examples may be found in those contracts for the transportation to foreign ports of shipments originating inland, one through bill of lading being given to cover the transit by both rail and water. These contracts may and perhaps often do contain arbitration agreements similar to the one herein. The disputes growing out of such contracts may, of course, be maritime or non-maritime or both. Indeed the settlement of one of

two disputes may be dependent on the determination of another; one maritime, the other non-maritime. The legal problems arising from an attempt to define with accuracy those disputes arising under such contracts which would be subject to the arbitration clause, as involving no maritime question in their determination, would probably precipitate as much litigation as the agreement was designed to avoid. But such a result could not well be avoided if the decision of the New York Court of Appeals were to stand.

We do not believe that this court can find in the provisions conferring jurisdiction on the admiralty court either necessity or warrant justifying such a result. Considerations not only of principle and of justice but also of expediency would seem to demand that in those states enforcing it the arbitration clause should not be considered half-good and half-bad, effective as to one group of questions arising under the agreement containing it and inoperative as to another, but should be regarded rather as valid and enforceable in respect to any and all controversies growing out of the general agreement, whether maritime or non-maritime, just as any other clause therein capable of specific performance would be enforced by a Court of equity, regardless of the nature of the consideration or of the contract in which it was found.

POINT II.

The ultimate controversies between the parties herein are within the jurisdiction of the State Court and the remedy provided by the State Statute even considered as one for the settlement of such underlying disputes is a Common Law remedy within the Saving Clause.

Respondent's Contention.

The respondent contended in the state court that the statute created a new remedy for the redress of violations of the covenants in the principal contract and that petitioner was seeking in the state court the return of the overpaid charter hire. Respondent sought to justify this contention with a statement of the New York Court of Appeals found in the opinion rendered by it in *Matter of Berkowitz* v. *Arbib & Houlberg*, (*supra*) to the effect that *arbitration* is a *remedial procedure* and that the statute had made two remedies *available* to redress the violation of a contract where formerly there was one.

This same contention was made in the United States District Court after the suit had been removed to that court in order to sustain the allegation that the suit was one that involved a controversy in which the value of the matter in dispute was at least of the jurisdictional amount of $3,000.00. That court however in remanding the suit to the state court held that it was not one for the return of the overpaid charter hire, but one to enforce the agreement to arbitrate and inasmuch as that agreement had no determinable pecuniary value the jurisdictional

mount was not involved (*Re Red Cross Line*, 77 Fed. Rep. 853). In this connection the Court aid in part at page 856:

> "* * * The overpaid charter hire is not here the matter in dispute but solely the right to specific performance of the agreement to arbitrate. If the arbitration is ordered the function of the court so far as the proceeding instituted goes ceases."

The Court of Appeals did not rule specifically n this question. It did not, however, although ne opinion of the District Court was indirectly part of the record and incorporated in petioner's brief, deny that the conclusion of the 'ederal Court was correct. Instead, it accepted ne contention of petitioner to that effect as ointed out herein in Point I, but concluded that o enforce the agreement in the state court would eny to the admiralty court its exclusive jurisiction.

Even if the ultimate controversies between hc parties are the subject of the state remedy, he state remedy is the equivalent of a common aw remedy and is one that is saved to suitors.

The respondent urged in the state court of ppeals, as it urged in its brief filed in this court n answer to the petition for the writ of certiorari herein, that it is the controversies beween the parties and not the arbitration agreement that is the subject of the statutory remedy. Respondent's contention would seem to be, therefore, that the order directing arbitration and the proceedings to be had before the arbitrators is a mere part of an additional remedy provided

in the state court for the settlement of controversies had between parties. Even if we assume for the purpose of argument that this contention is true and that this was the theory upon which the Court of Appeals acted, the dismissal of the proceedings by that court was erroneous because on the basis of that assumption the proceeding amounts to nothing more than an ordinary suit for damages for a breach of contract in which the determination of liability and damages, by an agreement that the court enforces, is left to arbitrators. In other words, if the court assumed that from the time when the Supreme Court of the State took jurisdiction to enforce the arbitration agreement it retained it until the award was made a judgment and that the remedy sought was in fact one to recover the loss sustained by reason of the alleged breach of the covenants of the principal contract, it does not differ from any other remedy *in personam* except that the court enforces by an auxiliary process authorized by the state statute the agreement that the merits of the controversy and judgment thereon shall be conditioned upon the report of arbitrators just as without the statute the court might condition its judgment upon any other extrinsic fact that agreement had prescribed. The remedy provided by the statute is therefore, in that view of the matter, a common law remedy or one that is "equivalent thereto". It is "essentially a proceeding according to the course of the common law" as "distinguished from admiralty proceedings" and is a remedy saved to suitors by reason of the provision "saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it".

The Court of Appeals, however, in its opinion in the case at bar after quoting the provisions conferring jurisdiction on the admiralty court and discussing the nature of the questions raised by the controversy, concludes (p. 39, fol. 96):

> "* * * the subject of the controversy existing between the parties is clearly one pertaining to navigation, consequently the *question of liability or non-liability of the owner to the charterer* is within the *exclusive* jurisdiction of the courts of admiralty."

We submit that the conclusion of the court as thus announced discloses clearly that it has misapprehended the effect of the provisions conferring jurisdiction of maritime causes on the admiralty court. The grant of judicial power in cases of admiralty and maritime jurisdiction has never been construed as excluding the jurisdiction of the common law courts over civil causes simply because the admiralty court has unquestionable jurisdiction over these causes. Mr. Justice Story in his Commentaries on the Constitution referring to the grant of admiralty jurisdiction wrote as follows:

> "The reasonable interpretation would seem to be that it conferred on the national judiciary the admiralty and maritime jurisdiction, exactly according to the nature and extent and modifications in which it existed in the jurisprudence of the common law. When the jurisdiction was exclusive, it remained so; when it was concurrent, it remained so. Hence the states could have no right to create Courts of Admiralty as such, or to confer on their own courts the cognizance of

> such cases as were exclusively cognizable in admiralty courts. But the states might well retain and exercise the jurisdiction in cases of which the cognizance was formerly concurrent in the courts of common law. The latter class of cases can be no more deemed cases of admiralty and maritime jurisdiction than cases of common law." 3 *Com. on Const.*, Sec. 1,006.

The effect, moreover, of the grant of jurisdiction in the clause "saving to suitors in all cases the right of a common law remedy where the common law is competent to give it" has always been held to confer concurrent jurisdiction on the state courts to furnish a common law remedy in civil cases of maritime origin even if the jurisdiction had not existed before (*New Jersey Steam Navigation Co.* v. *Merchants Bank*, 6 How. 344, 390; *Propeller Genesee Chief* v. *Fitzkirk*, 12 How. 443, 448; *The Belfast*, 7 Wall 622, 644; *Leon* v. *Galceran*, 11 Wall. 185, 187-188; *Schoonmaker* v. *Gilmore*, 102 U. S. 118; *Insurance Co.* v. *Durham*, 11 Wall 1, 32; *Manchester* v. *Massachusetts*, 138 U. S. 262).

The jurisdiction of the state court being concurrent to this extent, the "*question of liability or non-liability*" in maritime controversies is of course not within the "*exclusive*" jurisdiction of the admiralty court. The question to be determined is not, therefore, as was stated by the Court of Appeals, "whether or not the controversy between the parties is one of admiralty or of state jurisdiction" (p. 39, fol. 95) but rather, in the event that the remedy in question

be considered one to redress the violation of the principal contract, whether that remedy falls within the saving clause, saving to suitors in all cases the right of a common law remedy where the common law is competent to give it. This determination calls for the construction of a federal statute in relation to the remedy in question and this court of course is no more bound by the determination of the state court to the effect that the remedy is not embraced within the saving clause than it would be if the state court had held the reverse.

It makes little difference therefore whether the State Court of Appeals meant what it said in the above quoted language or whether, assuming that the statutory remedy is one for the violation of the covenants in the principal contract, the court intended to decide only that the remedy is not within the saving clause. In either event the court would seem to be in error. And inasmuch as the only reference, if it may be considered a reference, in the opinion as to the effect of this clause is found in the short statement that the statutory remedy is not "embraced within the exceptions contained in the Judicial Code" (p. 40), citing *Matter of Berkowitz* (*supra*), a case in which the court was not interpreting or considering the saving clause, it is evident that the court gave little or no consideration to the meaning, history, or prior judicial construction of this clause.

Review of Cases Interpreting the "Saving Clause."

The earlier cases in which the courts were called upon to determine the meaning of the saving clause were cases in which state statutes had attempted to confer upon the state courts the peculiar remedy of *a proceeding in rem* for causes cognizable in the admiralty court either *in rem* or *in personam*. Such were the cases of *The Moses Taylor*, 4 Wall. 411; *Hine* v. *Trevor*, 4 Wall. 555; *The Belfast*, 7 Wall. 624; *The Lottawana*, 21 Wall. 558; *The J. E. Rumble*, 148 U. S. 1; *The Glide*, 167 U. S. 606. In these cases it was pointed out that the violation of the exclusive jurisdiction of the admiralty resulted from the attempt to provide in the state court for maritime causes *a remedy peculiarly in the province of the admiralty court.*

The true limitation of state legislation in providing remedies for maritime causes is stated, impliedly at least, in *The Hine* v. *Trevor* (*supra*), as *such* remedies as would make the jurisdiction of the state court *concurrent* in all cases with that of the admiralty. As was said by the court in that case at pages 571 and 572, after pointing out that the remedy there in question was one "partaking of all the essential features of an admiralty proceeding *in rem*":

> "But it could not have been the intention of Congress, by the exception in that section, to give the suitor *all* such remedies as might *afterwards be enacted by State statutes*, for this would have enabled the States to make the jurisdiction of their courts *concur-*

> *rent* in all cases, by simply providing a statutory remedy for all cases. Thus the exclusive jurisdiction of the Federal courts would be defeated."

In *The Lottawana* (*supra*), however, the court in delimiting the scope of state legislation in maritime matters went further and pointed out the true meaning of the expression "common law remedy" or the "equivalent thereto" by contrasting it with the remedy *in rem* and pointing out that the latter is "exclusively conferred upon the District Courts of the United States"; and that state legislation can neither exclude a maritime contract from the domain of admiralty jurisdiction nor confer admiralty jurisdiction upon the state courts so as to enable them to proceed *in rem*, but can only authorize the enforcement of maritime contracts "by common law remedies or *such remedies as are equivalent thereto.*"

In this connection the court said at page 580:

> "State laws, it is true, cannot exclude the contract for furnishing such necessaries from the domain of admiralty jurisdiction, *for it is a maritime contract*, and they cannot alter the limits of that jurisdiction; nor can they confer it upon the State courts so as to enable them to proceed *in rem* for the enforcement of liens created by such State laws, for it is exclusively conferred upon the District Courts of the United States. They can only authorize the enforcement thereof by *common law remedies, or such remedies as are equivalent thereto.*"

The first attempt however to crystallize by definition the dividing line between those proceedings which do and those which do not violate the exclusive jurisdiction of the admiralty is found in *Knapp Stout & Co.* v. *McCaffrey*, 177 U. S. 638. In that case McCaffrey had a half raft of lumber in his possession at Boston Bay, Illinois, which was part of a raftage that he had towed under a *concededly maritime contract* from Stillwater, Minnesota, to St. Louis. His towage charges being unpaid McCaffrey filed a bill in equity in the Illinois State Court to foreclose his lien, the *local law* allowing the enforcement of possessory liens in equity. A decree was entered in his favor for the sum of $3,643.17, which was affirmed by the Supreme Court of the State. This court in reviewing the determination of the state court stated in effect on page 644 that inasmuch as the proceeding taken was not a comon-law action, but a suit in equity, the real question before it was "whether the proceeding taken is within the exception 'of saving to suitors in all cases the right of a common-law remedy where the common-law is competent to give it'." The court then pointed out that the reservation was not of an action at common-law but of a common-law remedy; that a remedy does not necessarily imply an action; but that it is the means employed to enforce a right or redress an injury. The court concluded that the proceeding taken was therefore within the saving clause and laid down the principle in reference to the exclusive jurisdiction of the admiralty court on page 648 as follows:

"The *true distinction* between such *proceedings* as are and such as are not invasions of the *exclusive admiralty jurisdiction* is this: If the cause of action be cognizable in admiralty and the suit be *in rem* against the thing itself though a monition be also issued to the owner the proceeding is essentially one in admiralty. If, upon the other hand, the cause of action be not one of which a court of admiralty has jurisdiction or *if the suit be in personam against an individual defendant* with an auxiliary attachment against a particular thing or against the property of the defendant in general it is *essentially* a proceeding *according to the course of the common law* and within the saving clause * * *."

In *Leon* v. *Galceran,* 11 Wall. 185, it was held that a suit for wages on a mariner's contract in the State Court and the concurrent issuance of a writ of sequestration authorized by the Louisiana statute against a vessel as security to respond to a judgment if recovered against her owner, was not an invasion of the exclusive admiralty jurisdiction but that the suit was one *in personam* and within the saving clause. Likewise in *Rounds* v. *Cloveport Foundry,* 237 U. S. 303 the institution of a suit *in personam* in the state court on a maritime contract and the concurrent issuance therein of a process of attachment under the Kentucky Statute was held not to violate this exclusive jurisdiction.

Principle to be Drawn from Cases and its Application Herein.

It would seem clear therefore that, in a suit on a maritime contract against a *person* to recover a *money judgment*, the mere issuance of an auxiliary process, *authorized by a state statute* in *aid* of the suit is not an infringement of the exclusive jurisdiction of Admiralty, but is a suit *in personam* and within the saving clause.

It is to be noted that the cases above referred to are those in which *remedies only* were considered and likewise remedies for the enforcement only of rights and obligations created by a maritime contract or raised by the General Maritime Law. The principle to be drawn from them and also the correct interpretation of the saving clause is we believe accurately stated in *Corpus Juris*, Vol. 1, p. 1,253, as follows:

> "The clause saving to suitors a common law remedy where the common-law is competent to give it *is intended to save the remedy or right of action in those courts which proceed according to the course of the common-law as distinguished from Admiralty proceedings* and the words 'common-law remedy' do not necessarily imply an action or remedy in a common-law court *but are equivalent to the means employed to enforce a right or redress an injury.*"

See also to the same effect *Johnson* v. *Westerfield*, 143 Ky. 10, 14; and *Chase* v. *American Steamboat Co.*, 9 R. I. 419, aff'd. 16 Wall. 522.

The same rule though stated in somewhat different language was recently laid down in *The*

Kalfarli, 277 Fed. Rep. 391 (C. C. A.) 2nd Circuit. The court there said at page 394:

> "The right to proceed *in rem* is one which must be pursued in the admiralty courts; the right to proceed against the vessel *in rem* being *distinctly an admiralty remedy*, and as such exclusively within the jurisdiction of the admiralty courts of the United States. But the right to *proceed in personam against the shipowner on his contracts, money damages alone being demanded, has always been within the common-law courts which have a concurrent jurisdiction with the courts of admiralty in such cases. Benedict's Admiralty*, Sec. 127."

To apply these principles to the remedy here sought for, even if it be considered as one for the return of the overpaid charter hire, it is a remedy clearly within the scope of the saving clause. The proceeding is instituted by the service of process on a person; it is to redress the alleged breach of the covenants of the charter-party; it ends in an ordinary money judgment against a person, enforceable in the usual manner. It is one that obviously does not infringe the remedy that the courts have repeatedly said, in interpreting the provisions conferring jurisdiction, is "*exclusively* conferred upon the District Courts of the United States" and is one in "those courts which proceed according to the course of the common law *as distinguished from admiralty proceedings.*" It differs from an ordinary suit *in personam* only in that there is granted during the proceeding an interlocutory order authorized by the statute for the specific

performance of the agreement that judgment shall be conditioned upon the report of arbitrators. In other words, it is an ordinary action for damages for breach of contract, in which the court's judgment is to be predicated upon the report of arbitrators according to the parties' own agreement, which agreement is enforced like any other term of the contract.

That this is the only change effected by the application of the statute is in effect stated in the opinion in *Matter of Berkowitz, etc.* (*supra*). In that case, as we have pointed out above, the statute was assailed as abridging the general jurisdiction of the Supreme Court of the State. In answering this contention the court said in part at pages 275 and 276:

> "Contending parties have contracted that the merits of their controversy shall be conditioned upon the report of arbitrators, *as upon any other extrinsic fact which agreement might prescribe.* Whether they have so contracted is a question which the court must still determine for itself. * * * If the contract has not been made or is invalid, the court will proceed, as in any other case, to a determination of the merits. If it has been made and is valid, the court will stay its hand till the extrinsic fact is ascertained, and the condition thus fulfilled * * *. 'In common language, where no attempt is made at logical accuracy,' it is sometimes said that the contract of arbitration 'ousts the jurisdiction' of the judges (*Wilson* v. *Glasgow Tramways & O. Co.*, 5 Session Cases (Scot., 4th Series, 981, 992). 'In strictness, however, it does not oust the jurisdiction, *but merely introduces a new plea*

> *into the cause'* on which the judge as at common law is under a duty to decide (*Wilson* v. *Glasgow Tramways & O. Co., supra*). The situation is the same in substance as when effect is given to a release or to a covenant not to sue. Jurisdiction is not renounced, but the time and manner of its exercise are adapted *to the convention of the parties restricting the media of proof.* Long before the statute there was a like withholding of relief whenever the subject-matter of arbitration, instead of extending to all differences, was limited to some (*Prest., etc., D. & H. C. Co.* v. *Pa. Coal Co.*, 50 N. Y. 250; *Scott* v. *Avery*, 5 H. L. 811; *Hamilton* v. *Liverpool, L. & G. Ins. Co.*, 136 U. S. 242, 255). There was a like refusal to permit the litigation of the merits when the contract though general, was no longer executory but had ripened into an award. *The change resulting from the statute is one of measure and degree.*"

We believe therefore that there can be no reasonable doubt that, even if the remedy provided by the statute may be considered to be one to redress a violation of the principal contract, the variation, effected by the enforcement of the arbitration agreement, of the ordinary procedure prevailing in an action for damages, is not such as would deprive it of the classification of a common law remedy or at least such a "remedy as is equivalent thereto."

We are not unmindful of the decisions of this Court in *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, and *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, much relied upon and quoted from

by the respondent in the State Courts and in its brief filed in opposition to the petition for the writ of certiorari herein. The statement of the court in the *Jensen* case that "the remedy which the compensation statute attempts to give is of a character wholly unknown to the common-law incapable of enforcement by the ordinary *process of any court*" can have no application to the remedy here sought, even if considered as one to recover the overpaid charter hire. Aside from this fact, however, we believe that the Court's remarks are not to be considered apart from the statute that it then had under consideration. Not only did that statute create a remedy, as defined by the court above, but *ex proprio vigore* it *substituted statutory rights* and *liabilities*, for those recognized, and for which a remedy existed, in the admiralty court and made them enforceable exclusively by the remedy thus created. As stated by this Court in the *Knickerbocker* case, *supra*, "The state enactment prescribes *exclusive rights and liabilities*, undertakes to secure their observance by *heavy penalties* and *onerous conditions* and provides novel remedies incapable of enforcement by an admiralty court."

The statutes considered in *Union Fish Co.* v. *Erickson*, 248 U. S. 308 and *Watts* v. *Camors*, 115 U. S. 353, also referred to by respondent were objectionable for the same reasons as those pointed out in the *Jensen*, *Knickerbocker* and *Chelentis* cases but the principles announced have no application here. In *Watts* v. *Camors* the court refused to apply the law of Louisiana in the admiralty court because to do so would be to *substitute* for the well known measure of dam-

ages raised by the admiralty law for breach of contract the measure of damages provided by the state law. In *Union Fish Co.* v. *Erickson* the court refused to apply the state statute in an action in the admiralty court because it *abolished* a well recognized maritime contract.

The distinction is obvious between the statutes condemned in the foregoing cases and the one here under consideration, which merely makes *available* an old equity process in a suit brought in the State Court to enforce *contractual rights.*

Furthermore, as we read the case of *Grant Smith-Porter Ship Co.* v. *Rohde,* 257 U. S. 469, 478, this Court found no violation of the exclusive admiralty jurisdiction in the enforcement of an *agreement* providing exclusive rights and liabilities and the remedy for their enforcement, although by such enforcement a party was deprived of the rights and remedies that he otherwise would have had in the admiralty court. *A fortiori* it would seem that no violation would result in enforcing an *agreed* method of determining the merits of a controversy in a suit for the enforcement of contractual rights and liabilities.

The question therefore in the last analysis resolves itself into this: Does the issuance of an auxiliary process, specifically to enforce a term of the contract upon which suit is brought in a court of concurrent jurisdiction violate the exclusive jurisdiction of the admiralty, merely because in a suit on the contract in the admiralty forum a policy may be said still to exist against such specific enforcement? If the *policy* of the

Admiralty Court is to control the policy of the state forum in the application of a remedy in a cause of concurrent jurisdiction, it is a distinct change of the general rule that the policy of the forum determines in matters of remedies. It is well known that the policies of the Federal Courts and the New York courts differ in reference to the enforcement of an agreement exempting a carrier from liability for negligence. It has, however, never been suggested that in a case of concurrent jurisdiction the policy of the state would not control in its forum. Neither do we believe that this Court will find in the provisions conferring jurisdiction on the admiralty court any justification for extending a rule of policy that in the nature of things belongs peculiarly and exclusively to the forum.

POINT III.

The Court of Appeals of the State of New York erred in holding that to enforce the arbitration agreement in the State Court would "destroy a rule of uniformity."

The Court of Appeals cited as authority for the above holding the cases of *Southern Pacific Company* v. *Jensen* (*supra*) and *Knickerbocker Ice Company* v. *Stewart* (*supra*). We submit that the court has drawn from these cases an unwarranted conclusion.

We start with the conceded premise that the sole function of the statute is to furnish a remedy. A remedy in a state court for a maritime

cause however has never been condemned on the theory that it destroyed uniformity. The saving of a common-law remedy not only saved the remedies of the several states within their several jurisdictions existing at the time of the passage of the Judiciary Act (which it has never been supposed were uniform) but also, as has been pointed out, statutory remedies subsequently enacted for maritime contracts or torts, so long as they did not attempt to parallel the peculiar remedies in the admiralty established for such cases. [*Leon* v. *Galceran* (*supra*); *Knapp Stout Co.* v. *McCaffrey* (*supra*); *Rounds* v. *Cloveport Foundry* (*supra*); *Chase* v. *American Steamboat Company* (*supra*)].

The uniformity rule is directed toward statutes changing rights and liabilities definitely fixed by maritime rules.

We read in the *Jensen* and *Stewart* cases no overruling of this principle. The violation of the uniformity rule referred to in those cases resulted from the attempts made to substitute statutory *rights and liabilities* for rights and liabilities definitely fixed by the maritime law. As was said by the court in the *Knickerbocker* case at page 159 referring to its holding in the *Jensen* case:

> "Thus we distinctly approved the view that the original saving clause conferred *no substantive rights* and did not authorize the states to do so. It referred only to *remedies* and to the extent specified permitted continued enforcement by the State Court of rights and obligations founded on maritime law."

That the destruction of uniformity condemned in the *Jensen* case resulted from the attempt made by the state to legislate *rights and liabilities* into maritime matters where the subject of legislation "admits and requires uniformity of *regulation*," was specifically pointed out by this Court at page 217, as follows:

> "If New York can *subject* foreign ships coming into her ports *to such obligations as those enforced by her compensation statute* other states may do likewise. The necessary consequence would be the destruction of the very uniformity in respect to maritime matters which the constitution was designed to establish and freedom of navigation between the states and foreign countries would be seriously hampered and impeded."

Again this Court in the recent case of *State Industrial Commission* v. *Nordenholt Corporation* (259 U. S. 263) in discussing the uniformity rule, referring to the *Jensen* case said at page 276:

> "In *Jensen's* case *rights and liabilities* were definitely fixed by *maritime rules whose uniformity was essential.* With these the *local law came into conflict.*"

Thus as we read the *Jensen* and *Stewart* cases, as well as other cases in which the uniformity rule has been applied or discussed, the statutes there considered were condemned as offending the rules because they wiped out rights secured by the maritime law or undertook to impose new liabilties and substitute new rights unknown to that law or both. Such statutes "worked ma-

terial prejudice to the characteristic features of the General Maritime Law and interfered with the proper harmony and uniformity of that law in its international and interstate relations." As was pointed out in *Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372, at page 382:

> "Under the doctrine approved in *Southern Pacific Co.* v. *Jensen*, no State has power to abolish the well recognized maritime rule concerning measure of recovery and substitute therefor the full indemnity rule of the common law. Such a substitution would distinctly and definitely *change or add to the settled maritime law;* and it would be destructive of the 'uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states'."

The arbitration statute neither changes nor impairs the rights and obligations fixed by maritime rules.

The statute here under consideration, however, does not impair or change the rights or liabilities existing under the maritime law or substitute other rights or liabilities for those sanctioned by the Maritime Law. Neither does it of its own force impose a new or compulsory remedy or alter in the slightest degree the remedy available in the Admiralty Court. Instead of depriving parties of rights and remedies under the maritime law or imposing new burdens unknown to that law, it merely makes available an auxiliary remedy in the State Court for the enforcement of contractual rights. It is the agreement of

the parties, not the mandate of the statute, that brings about the relinquishment of the usual methods for determining the merits of the dispute. If parties wish the usual method for determining merits to govern, they are not compelled to contract for a different one. If they do so contract that contract can be enforced in the same manner as that in which any other contract can. We can read in no decided case of this Court any suggestion that the uniformity rule may be invoked to deprive a party of a contractual right or shield another from the performance of his contractual obligation.

We assume of course without argument that a policy that had its genesis in the ancient jealousy of the *common law courts* of their jurisdiction and that presents an anomaly in the general law of contracts cannot be said to be a "characteristic feature of the general maritime law" that must be preserved in whatever court a maritime controversy may be presented.

Remedies Regulated by lex fori.

That a similar remedy may not exist in all the states to enforce a right or redress a maritime injury has, as we have shown, never been an objection to its use. *Knapp Stout Co.* v. *McCaffrey* (*supra*) illustrates the point. It was conceded in that case that the remedy there invoked was one sanctioned *only by the local law* (page 645), but that fact was not considered objectionable.

The fact that the *admiralty court* may refuse to adopt a part of the state practice in its courts

on the ground that to do so would introduce confusion and result in a lack of uniformity in the practice in the federal forum is of course no reason for condemning the remedy sought in the state court. The admiralty court presumably may exclude much of a state court practice on that ground. The statutory remedy of a Bill of Particulars is illustrative. Although the admiralty court refuses to apply such a remedy in its forum because to do so would result in a lack of uniformity of practice (*Foster* v. *Compagnie Francaise de Navigation a Vapeur*, 219 Fed. 351), it has never been suggested that this fact would be a reason for excluding its use in a case of concurrent jurisdiction in the state court. We presume that the admiralty jurisdiction concedes as much independence to the state jurisdiction in this respect as that which it exacts for itself.

It seems to us that the state court's independence of practice in a cause of concurrent jurisdiction was definitely conceded in *Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372. In that case the court pointed out at page 379 that the *substantive* rights under a maritime contract "must be the same *in every court*, maritime or common law," but concludes:

> "The only difference between a proceeding in the one court or the other would be that the *remedy would be regulated by the lex fori.*"

From whatever angle therefore the decision of the New York Court of Appeals may be viewed it can be supported, we contend, neither on prin-

ciple nor on precedent. And in view of the great benefit to be derived by the commercial public and the relief to be afforded to both courts and disputants resulting from the enforcement of the arbitration agreement, and in view also of the confusion and uncertainty and injustice that would obviously result from allowing the judgment of the New York court to stand, we submit that the same should be reversed.

POINT IV.

The judgment of the Supreme Court of the State of New York, New York County, entered upon the judgment and remittitur of the Court of Appeals of that State should be reversed.

Respectfully submitted,

HOMER L. LOOMIS,
Counsel for the Red Cross Line.

HOMER L. LOOMIS,
REGINALD B. WILLIAMS,
On the Brief.

APPENDIX.

CHAP. 275.

AN ACT in relation to arbitration, constituting chapter seventy-two of the consolidated laws. Became a law April 19, 1920, with the approval of the Governor.

Passed, three-fifths being present.

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

CHAPTER 72 OF THE CONSOLIDATED LAWS
ARBITRATION LAW.

Article 1. Short title (§1).

2. General provisions (§§ 2-6).

3. Application of certain sections of the code of civil procedure and repeal of certain other provisions thereof (§§7-9).

4. Time of taking effect (§10).

ARTICLE 1.

SHORT TITLE.

Section 1. Short title.

Section 1. Short title. This chapter shall be known as the "Arbitration Law."

ARTICLE 2.

General Provisions.

Section 2. Validity of arbitration agreements.

3. Remedy in case of default.

4. Provision in case of failure to name arbitrator or umpire.

5. Stay of proceedings brought in violation of an arbitration agreement or submission.

6. Applications to be heard as motions.

§ 2. VALIDITY OF ARBITRATION AGREEMENTS. A provision in a written contract to settle by arbitration a controversy thereafter arising between the parties to the contract, or a submission hereafter entered into of an existing controversy to arbitration pursuant to title eight of chapter seventeen of the code of civil procedure, shall be valid, enforcible and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§ 3. REMEDY IN CASE OF DEFAULT. A party aggrieved by the failure, neglect or refusal of another to perform under a contract or submission providing for arbitration, described in section two hereof, may petition the supreme court, or a judge thereof, for an order directing that such arbitration proceed in the manner provided for in such contract or submission. Eight

days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by law for personal service of a summons. The court, or a judge thereof, shall hear the parties, and upon being satisfied that the making of the contract or submission or the failure to comply therewith is not in issue, the court, or the judge thereof, hearing such application, shall make an order directing the parties to proceed to arbitration in accordance with the terms of the contract or submission. If the making of the contract or submission or the default be in issue, the court, or the judge thereof, shall proceed summarily to the trial thereof. If no jury trial be demanded by either party, the court, or the judge thereof, shall hear and determine such issue. Where such an issue is raised, any party may, on or before the return day of the notice of application, demand a jury trial of such issue, and if such demand be made, the court, or the judge thereof, shall make an order referring the issue or issues to a jury in the manner provided by law for referring to a jury issues in an equity action. If the jury find that no written contract providing for arbitration was made or submission entered into, as the case may be, or that there is no default, the proceeding shall be dismissed. If the jury find that a written contract providing for arbitration was made or submission was entered into and there is a default in the performance thereof, the court, or the judge thereof, shall make an order summarily directing the parties to the contract or submission to proceed with the arbitration in accordance with the terms thereof.

§ 4. PROVISION IN CASE OF FAILURE TO NAME ARBITRATOR OR UMPIRE. If, in the contract for arbitration or in the submission, described in section two, provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then, upon application by either party to the controversy, the supreme court, or a judge thereof, shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said contract or submission with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided, the arbitration shall be by a single arbitrator.

§ 5. STAY OF PROCEEDINGS BROUGHT IN VIOLATION OF AN ARBITRATION AGREEMENT OR SUBMISSION. If any suit or proceeding be brought upon any issue otherwise referable to arbitration under a contract or submission described in section two, the supreme court, or a judge thereof, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under a contract containing a provision for arbitration or under a submission described in section two, shall stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement.

§ 6. APPLICATIONS TO BE HEARD AS MOTIONS. Any application to the court, or a judge thereof, hereinunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

ARTICLE 3.

APPLICATION OF CERTAIN SECTIONS OF THE CODE OF CIVIL PROCEDURE AND REPEAL AND AMENDMENT OF CERTAIN OTHER PROVISIONS THEREOF.

Section 7. Repeal of provisions of code of civil procedure.

8. Application of certain sections of code of civil procedure.

9. Amendment of certain section of code of civil procedure.

§ 7. REPEAL OF PROVISIONS OF CODE OF CIVIL PROCEDURE. Sections twenty-three hundred and eighty-three, twenty-three hundred and eighty-four and twenty-three hundred and eighty-five of chapter seventeen, title eight, of the code of civil procedure are hereby repealed.

§ 8. APPLICATION OF CERTAIN SECTIONS OF CODE OF CIVIL PROCEDURE. The provisions of Sections twenty-three hundred and sixty-five to twenty-three hundred and eighty-six of the code of civil procedure, both

inclusive, except sections twenty-three hundred and eighty-three, twenty-three hundred and eighty-four and twenty-three hundred and eighty-five, so far as practicable and consistent with this chapter, shall apply to an arbitration agreement under this chapter, and for such purpose the arbitration agreement shall be deemed a submission to arbitration. Wherever in such sections reference is made to the court specified in the submission, the supreme court shall have jurisdiction of the subject matter if no court be specified in the arbitration agreement.

§ 9. AMENDMENT OF CERTAIN SECTION OF CODE OF CIVIL PROCEDURE. Section twenty-three hundred and eighty-two of the code of civil procedure is hereby amended to read as follows:

§ 2382. Where a party dies after making a submission either as prescribed in this title or otherwise, if the submission contains a stipulation, authorizing the entry of a judgment upon the award, the award may be confirmed, vacated, modified, or corrected, upon the application of, or upon notice to, his executor or administrator, or a temporary administrator of his estate; or, where it relates to real property, his heir or devisee, who has succeeded to his interest in the real property. Where a committee of the property, or of the person, of a party to a submission is appointed, the award may be confirmed, vacated, modified, or corrected, upon the application of, or notice to, a committee of the property; but not otherwise. In a case specified in this

section, a judge of the court may make an order, extending the time within which notice of a motion to vacate, modify, or correct the award must be served. Upon confirming an award, where a party has died since it was filed or delivered, the court must enter judgment in the name of the original party; and the proceedings thereupon are the same, as where a party dies after a verdict.

ARTICLE 4.

Time of Taking Effect.

Section 10. Time of taking effect.

§ 10. Time of taking effect. This act shall take effect immediately.

Chap. 14.

AN ACT to amend the arbitration law, in relation to arbitration agreements.

Became a law March 1, 1921, with the approval of the Governor.

Passed, three-fifths being present.

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Section two of chapter two hundred and seventy-five of the laws of nineteen hundred and twenty, entitled "An Act in rela-

tion to arbitration, constituting chapter seventy-two of the consolidated laws," is hereby amended to read as follows:

§ 2. VALIDITY OF ARBITRATION AGREEMENTS. A provision in a written contract to settle by arbitration a controversy thereafter arising between the parties to the contract, or a submission hereafter entered into of an existing controversy to arbitration pursuant to title eight of chapter seventeen of the code of civil procedure, or article eighty-three of the civil practice act shall be valid, enforcible and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§ 2. Section eight of such chapter is hereby amended to read as follows:

§ 8. APPLICATION OF CERTAIN SECTIONS OF CODE OF CIVIL PROCEDURE AND THE CIVIL PRACTICE ACT. The provisions of sections twenty-three hundred and sixty-five to twenty-three hundred and eighty-six of the code of civil procedure, both inclusive, except sections twenty-three hundred and eighty-three, twenty-three hundred and eighty-four and twenty-three hundred and eighty-five, and the corresponding sections of the civil practice act, namely sections fourteen hundred and ten to fourteen hundred and thirty-one, both inclusive, except sections fourteen hundred and twenty-eight, fourteen hundred and twenty-nine and fourteen hundred and thirty, so far as practicable and consistent with this chapter, shall

apply to an arbitration agreement under this chapter, and for such purposes the arbitration agreement shall be deemed a submission to arbitration. Wherever in such sections reference is made to the court specified in the submission, the supreme court shall have jurisdiction of the subject matter, if no court be specified in the arbitration agreement.

§ 3. This act shall take effect April fifteenth, nineteen hundred and twenty-one.

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Supreme Court of the United States

OCTOBER TERM, 1922.

RED CROSS LINE,
Petitioner,
against
ATLANTIC FRUIT COMPANY,
Respondent.

In the Matter
of
The petition of RED CROSS LINE for an order directing ATLANTIC FRUIT COMPANY to proceed to arbitration.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement.

The petitioner, Red Cross Line, seeks to have reviewed by means of a writ of certiorari, the decision of the Court of Appeals of the State of New York, that the Arbitration Law of New York, Chapter 275 of the Laws of 1920, does not

apply to the controversy between the parties to this proceeding.

The Arbitration Law, a copy of which appears in the appendix added to the petitioner's brief, provides in Section 2 in substance, that an arbitration stipulation in a written contract shall be valid, enforcible and irrevocable, and in Section 3 that in the event of the failure or refusal of one of the parties to the contract to carry out the arbitration agreement, the other party may petition the Supreme Court or a Judge thereof for an order directing that such arbitration proceed in the manner provided for in the agreement.

On April 13, 1921, counsel for the petitioner served upon the Atlantic Fruit Company a verified petition to which was attached a notice that a motion would be made at Special Term, Part I of the Supreme Court of New York County, on April 21, 1921, for an order directing Atlantic Fruit Company to proceed to the arbitration of the petitioner's claim as set forth in the petition, pursuant to Chapter 275 of the Laws of 1920 (Record, fols. 10-12).

The averments of the original petition are set out in Article 3 of the petition herein with sufficient fullness to make their repetition unnecessary by the respondent.

In addition to filing a formal answer to the petition (Record, fols. 75-99), the Atlantic Fruit Company submitted affidavits in opposition to the motion of the Red Cross Line (Record, fols. 100-111). The contention made by Atlantic Fruit Company was that the real dispute between the parties was of a maritime nature, having arisen out of a charter party, and hence the Arbitration Law of New

York, in providing a new remedy for the enforcement of arbitration agreements, did not apply, but that if it was intended to apply to and govern such a dispute as the one between these parties, it was contrary to the Constitution of the United States, Article III, Section 2, and to Section 24 of the Judicial Code of the United States, Subdivision Third, and to Section 256 of the Judicial Code of the United States, Subdivision Third.

The New York Supreme Court, New York County, after a hearing at a Special Term, Part I, granted the petition of Red Cross Line (Record, fols. 4-9), which order was later affirmed without opinion by the Appellate Division of the New York Supreme Court (Record, fols. 219-222). On appeal by Atlantic Fruit Company, however, to the Court of Appeals of New York, that Court unanimously reversed the order on the ground that the subject of the controversy between the parties was within the admiralty and maritime jurisdiction of the United States Courts, and that therefore the remedy provided by the Arbitration Law, which was a statutory legal remedy unknown to the common law, was not within the saving clause of the Judicial Code, Section 24, Subdivision Third. It was accordingly held that an intention could not be attributed to the Legislature of the State of New York to limit or usurp the jurisdiction of the Federal Courts. The Court of Appeals also held that to apply the remedy provided by the Arbitration Statute would be to impair the rule of uniformity in the application of the admiralty law in the United States. The decision of the Court of Appeals is reported in 233 N. Y., 373 (*Matter of Red Cross Line* v. *Atlantic Fruit Com-*

pany), and is printed in the record herein (Record, fols. 265-291).

It is respectfully submitted that the petition should be denied for the following reasons:

1. The dispute between the parties herein arises out of the charter party of the steamship "Runa," which is a maritime contract. It is therefore within the admiralty and maritime jurisdiction of the United States Courts, which is exclusive, except for the reservation in the Judicial Code of common law remedies to suitors. The remedy invoked in this proceeding is purely statutory, unknown to the common law, and hence is not saved to the petitioner.

Section II of Article III of the Constitution of the United States provides in part as follows:

> "The judicial power shall extend * * * to all cases of admiralty and maritime jurisdiction."

Judicial Code, Section 24, U. S. Comp. Stat., Sec. 991, Subdivision Third, provides as follows:

> "The district courts shall have original jurisdiction as follows: * * * Third. Of all civil causes of admiralty and maritime jurisdiction saving to suitors in all cases the right of common law remedy where the common law is competent to give it."

Section 256 of the Judicial Code, U. S. Comp. Stat., Section 1233, Subdivision Third, provides as follows:

> "The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several States; * * *
>
> Third. Of all civil causes of admiralty and maritime jurisdiction; saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it."

The saving clause of the Judicial Code refers on its face to remedies, and this has been construed to mean common-law remedies and not remedies in common law courts.

See:

> *The Moses Taylor,* 4 Wallace, 411 at page 431.

The New York Court of Appeals in *Matter of Berkovitz* v. *Arbib & Houlberg* and *Spiritusfabriek Astra of Amsterdam Holland* v. *Sugar Products Company,* 230 N. Y., 261, held that the Arbitration Law created a new remedy, stating as follows at page 270:

> "The common-law limitation upon the enforcement of promises to arbitrate is part of the law of remedies * * *. The rule to be applied is the rule of the forum. Both in this court and elsewhere, the law has been so declared. Arbitration is a form of procedure

> whereby differences may be settled. It is not a definition of the rights and wrongs out of which differences grow. This statute did not attach a new obligation to sales already made. It vindicated by a new method the obligation then existing."

The Court further stated, at page 272:

> "Here the wrong to be redressed is the rejection of merchandise in violation of a contract. Such a wrong had a remedy for centuries before the statute. All that the statute has done is to make two remedies available when formerly there was one."

The Court of Appeals in the present case (233 N. Y., 373), reiterated in substance what it had previously stated in *Matter of Berkovitz* v. *Arbib & Houlberg, supra,* at page 381:

> "The section of the Arbitration Law (Section 3), under which the order herein was granted, has been construed by us as a statutory legal remedy of a character unknown to the common law (*Matter of Berkovitz* v. *Arbib & Houlberg,* 230 N. Y., 261). It therefore is not embraced within the exceptions contained in the Judicial Code."

A charter-party of a vessel is a maritime contract and disputes arising out of it are within the admiralty and maritime jurisdiction of the United States Courts.

In *Morewood et al.* v. *Enequist,* 23 Howard, 491, this Court, discussing the nature of a charter party

and referring to its previous decision in *New Jersey Steamboat Company* v. *The Merchants' Bank of Boston* (6 How., 334), stated at page 493:

> "The whole subject was most thoroughly investigated both by counsel and the court. Everything connected with the history of courts of admiralty, from the reign of Richard the Second to the present day—everything which the industry, learning, and research, of most able counsel could discover, was brought to our notice. We then decided that charter-parties and contracts of affreightment are 'maritime contracts' within the true meaning and construction of the Constitution and act of Congress, and cognizable in courts of admiralty by process either in rem or in personam."

See also:

> *Metropolitan S. S. Co.* v. *Pacific Alaska Nav. Co.*, 260 Fed., 973;
> *Dunbar* v. *Weston*, 93 Fed., 472.

This Court in *Southern Pacific Company* v. *Jensen*, 244 U. S., 205, decided that the Workmen's Compensation Act of New York provided a *remedy* and was unconstitutional insofar as such remedy was intended to apply to matters of a maritime nature.

It was stated at page 218 as follows:

> "The remedy which the Compensation Statute attempts to give is of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any

court and is not saved to suitors from the grant of exclusive jurisdiction."

In *Knickerbocker Ice Company* v. *Stewart,* 253 U. S., 149, the Court stated at page 158:

> "We also pointed out that the saving clause taken from the original Judiciary Act had no application, since, at most, it only specified common-law remedies, whereas the remedy prescribed by the compensation law was unknown to the common law and incapable of enforcement by the ordinary process of any court."

In *The Hine* v. *Trevor,* 4 Wall., 555, this Court, referring to the saving clause in the ninth Section of the Judiciary Act, the same one now under consideration, stated at page 571:

> "But it could not have been the intention of Congress, by the exception in that section, to give the suitor all such remedies as might afterwards be enacted by State statutes for this would have enabled the States to make the jurisdiction of their courts concurrent in all cases, by simply providing a statutory remedy for all cases. Thus the exclusive jurisdiction of the Federal courts would be defeated."

See also:

Brookman v. *Hamill,* 43 N. Y., 554;
The Lottawanna, 21 Wallace, 558;
The J. E. Rumble, 148 U. S., 113;
Union Fish Company v. *Erickson,* 248 U. S., 308.

It is settled, therefore, by the cases quoted, that a remedy applicable to cases within the admiralty and maritime jurisdiction of the United States courts must, in order to come within the permission of the Judicial Code, be a common-law remedy, which the common-law is competent to give, and not a statutory remedy.

2. The decision of the Court of Appeals is in complete harmony with the decisions of this Court.

The Court of Appeals discerned at once that the real fundamental dispute between the parties was whether or not the Red Cross Line was entitled to reimbursement for alleged overpaid charter hire and disbursements made by it when the "Runa" was claimed to be off hire. It recognized that the petitioner, regardless of what was said by its counsel, wished the settlement of the controversy through the machinery provided by the Arbitration Law. Having found that this law created a new statutory remedy unknown to the common law, its only course was to declare the remedy inapplicable to the dispute in hand under the authority of the decisions of this Court in *Southern Pacific Company* v. *Jensen*, and *Knickerbocker Ice Company* v. *Stewart, supra.*

It is not true that the Court of Appeals decided that under all circumstances the jurisdiction of the United States Courts over a controversy such as the present one would be exclusive. It had well in mind the saving clause contained in Section 24 of the Judicial Code, for the opinion begins with a reference to that very clause. It is, therefore, un-

fair to lift any portion of the opinion bodily from its context and then argue that the decision of the Court of Appeals was erroneous on the subject of jurisdiction. A reading of the opinion in its entirety will disclose no confusion on the part of the Court of Appeals on the subject of Federal and State jurisdiction over maritime disputes.

Reply to the Argument of the Petitioner.

We shall endeavor to answer as briefly as possible the arguments advanced by the petitioner. First, it is contended that the agreement to arbitrate, stated to be the subject of the remedy, is not a maritime covenant, and hence is not a matter of admiralty and maritime cognizance. It is said that a charter party is a bundle of covenants, maritime and non-maritime, and that the arbitration agreement falls within the latter class.

Our answers are: (1) that the arbitration stipulation is maritime and that it has been so held; (2) it is maritime, because its subject matter, *particularly considering the matters in dispute, already specified, which have arisen*, is maritime; and (3) the enforcement of the arbitration covenant is not the end sought, but by the aid of the Arbitration Statute, the means to the end.

In *Munson* v. *Straits of Dover S. S. Co.*, 99 Fed., 787, affirmed by the Circuit Court of Appeals for the Second Circuit in 102 Fed., 926, jurisdiction was taken by an admiralty court of an action to recover damages for a breach of an agreement to arbitrate matters in dispute under a charter party. The Court sustained exceptions to the libel

on the ground that the subject of damages on the breach of an arbitration agreement was one too remote to be made the basis of an action. Neither the Circuit Court of Appeals nor the District Court expressed any doubt as to the jurisdiction of the admiralty court over such a case, or questioned the maritime nature of the stipulation.

Moreover, in determining whether an agreement is maritime or not, its subject matter rather than the mere agreement itself is what controls. It is true that this arbitration agreement was made on land and would be performed on land. Nevertheless it is an agreement with reference to maritime disputes.

In *North Pacific Steamship Company* v. *Hall Brothers Marine Railway & Shipbuilding Company*, 249 U. S., 119, this Court on the subject of admiralty jurisdiction in matters of contract, stated at page 125:

> "It must be taken to be the settled law of this Court that while the civil jurisdiction of the admiralty in matters of tort depends upon locality—whether the act was committed upon navigable waters—in matter of contract it depends upon the subject-matter—the nature and character of the contract; and that the English rule, which conceded jurisdiction, with a few exceptions, only to contracts made and to be executed upon the navigable waters, is inadmissible, the true criterion being the nature of the contract, as to whether it have reference to maritime service or maritime transaction."

See also:

Baltimore Steam-Packet Co. v. *Paterson*, 106 Fed Rep., 736;
Graham v. *Oregon R. & Navigation Co.*, 135 Fed., 608.

The petitioner on page 18 of its brief refers to the case of *The Ada*, 250 Fed., 194, where the District Court had under consideration a charter party containing covenants to purchase the captain's chronometer and the steamer's ice-box and held that they were not maritime. Such covenants, however, are very different from one to arbitrate disputes arising out of a maritime contract.

The petitioner also refers on the same page to the case of *Pacific Surety Company* v. *Leatham & Smith Towing & Wrecking Company*, 151 Fed., 440 where the Court held that a bond securing the performance of a charter party was not a maritime obligation. The admiralty court refused to take jurisdiction because the respondent executing the bond was not a party to the original maritime contract. That case is entirely different from the one now before this Court for the reason that here both the petitioner and respondent were parties to the martime contract and the covenant sought to be enforced is a component part of the agreement.

As matters stood when the Red Cross Line made its demand for arbitration and filed its petition, *the matters in dispute*, to settle which the arbitration stipulation was invoked, were maritime in nature.

In view of the decisions of this Court holding that the subject matter is what determines the question of admiralty jurisdiction in matters of

contract, it is needless to argue further whether the arbitration clause standing alone is or is not a maritime covenant, because here its subject matter is a maritime dispute, which clearly comes within the admiralty and maritime jurisdiction, except where a common law remedy is saved.

Counsel for the petitioner continually insists that *arbitration,* and not the differences arising between the parties out of the voyage of the steamship "Runa," is the subject of the remedy relied upon. This contention is absolutely unsound. The arbitration covenant is not the subject of the remedy but, by virtue of the Statute, is the remedy itself. The Arbitration Statute and the covenant *together* create the remedy. Each is impotent without the other. The Court of Appeals completely demolished this argument and the statement of petitioner's counsel on page 19 that the Court did not deny the soundness of this contention is disingenuous, to say the least.

It is further urged that the Arbitration Statute creates no new remedy but merely makes available the old equity remedy by way of specific performance. It is also stated on page 29 of the petitioner's brief that arbitration was an ancient common law method of enforcing rights and redressing wrongs. Nothing could be further from the truth.

The arbitration clause in question appears in Article Sixth of the petition of the Red Cross Line (Record, fols. 21, 22). There never was a time when the performance of an arbitration clause such as this was specifically enforced by a court of equity or any other court. Arbitration clauses drawn in this form were unenforcible in Federal and State courts alike. The only recourse of an aggrieved party was an action for damages for refusal to arbitrate.

In *U. S. Asphalt R. Co.* v. *Trinidad Lake P. Co.*, 222 Fed. Rep., 1006, Judge Hough had under consideration an arbitration clause practically identical with the present one. The Court reviewed the authorities on arbitration agreements at great length, and stated as follows at page 1012:

> "I think the decisions cited show beyond question that the Supreme Court has laid down the rule that such a complete ouster of jurisdiction as is shown by the clause quoted from the charter-parties is void in a Federal forum."

See also:

> *Insurance Co.* v. *Morse,* 20 Wall., 457.
> *Doyle* v. *Insurance Co.,* 94 U. S., 535.
> *Meacham* v. *Jamestown & Co.,* 211 N. Y., 346.

Needless to say, if the courts of the State of New York had, previous to 1920, afforded to suitors a remedy for enforcing the specific performance of arbitration covenants, the enactment of the Arbitration Law by the New York State Legislature would have been an idle and useless proceeding. The Court of Appeals has rightly held that the statute creates an entirely new remedy.

On page 23 of its brief the petitioner alludes to the case of *Steamboat Company* v. *Chase,* 16 Wall., 522. There was no remedy whatever given in the admiralty court for loss of life resulting from a collision, and it was consequently held by the Supreme Court that the State courts were at liberty to exercise jurisdiction in actions not cognizable in the admiralty courts, just as if such courts were

unknown to the Constitution. The case has no bearing upon the present one, however, because the admiralty courts have always taken jurisdiction of disputes arising out of charter parties.

It is further urged that the Arbitration Statute is unobjectionable because the proceedings it contemplates are not *in rem* but *in personam* and that in any event the rule of uniformity in the application of the admiralty law is not affected.

There is no basis for the argument that the Judicial Code saves to suitors all remedies in the common law courts, as long as they are remedies *in personam* and not *in rem*. It happens that many of the State statutes declared invalid by this Court did provide for purely *in rem* proceedings. The rule, however, is much broader than that and it is settled that any State legislation on maritime matters, which tends to impair the uniformity so essential in the general application of admiralty law throughout the several States, is improper. Consider the cases of *Southern Pacific Company* v. *Jensen* and *Knickerbocker Ice Company* v. *Stewart, supra*. In the former case, the statute did not provide a remedy *in rem* and yet it was held unconstitutional.

This Court, after referring to the appropriate articles of the Constitution, stated at page 216:

> "In view of these constitutional provisions and the Federal Act, it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation. That this may be done to some extent cannot be denied. A lien upon a vessel for

repairs in her own port may be given by state statute * * * and the right given to recover in death cases * * *. Equally well established is the rule that state statutes may not contravene an applicable act of Congress or affect the general maritime law beyond certain limits. They cannot authorize proceedings *in rem* according to the course in admiralty * * * nor create liens for materials used in repairing a foreign ship. * * * And plainly, we think, no such legislation is valid if it contravenes the essental purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself. These purposes are forcefully indicated in the foregoing quotations from The Lottawanna."

The Court also stated at page 217:

"If New York can subject foreign ships coming into her ports to such obligations as those imposed by her Compensation Statute, other States may do likewise. The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the States and with foreign countries would be seriously hampered and impeded."

In *Knickerbocker Ice Company* v. *Stewart, supra,* where the amendment to Section 24 of the Judicial Code reserving to claimants rights and remedies under the Workmen's Compensation Law of any State was considered and held unauthorized, this Court stated at page 164:

> "And so construed, we think the enactment is beyond the power of Congress. Its power to legislate concerning rights and liabilities within the maritime jurisdiction and remedies for their enforcement, arises from the Constitution, as above indicated. The definite object of the grant was to commit direct control to the Federal Government; to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation; and to establish, so far as practicable, harmonious and uniform rules applicable throughout every part of the Union."
>
> "Considering the fundamental purpose in view and the definite end for which such rules were accepted, we must conclude that in their characteristic features and essential international and interstate relations, the latter may not be repealed, amended or changed except by legislation which embodied both the will and deliberate judgment of Congress. The subject was entrusted to it to be dealt with according to its discretion—not for delegation to others."

And again at page 166:

> "Obviously if every State may freely declare the rights and liabilities incident to maritime

employment, there will at once arise the confusion and uncertainty which framers of the Constitution both foresaw and undertook to prevent."

It will also be noted that in *Union Fish Company* v. *Erickson, supra,* and *Chelentis* v. *Luckenbach Steamship Company, Incorporated,* 247 U. S., 372, no questions of remedies *in rem* were before this Court.

In *Watts* v. *Camors,* 115 U. S., 353 (6 Supreme Court Reporter, 91), the Supreme Court of the United States had under consideration a charter party which contained a clause binding the parties to the true performance of the agreement in the penal sum of the estimated amount of freight. The Civil Code of Louisiana had been pleaded on the question of the stipulated damages.

The Court disregarded the Louisiana Statute and stated as follows at page 95.

> "But the law of Louisiana does not govern this question, whether it is treated as a question of construction of the contract of the parties, or as a question of judicial remedy. If it is considered as depending upon the intent of the parties as manifested by their written contract, the performance of that contract is to be regulated by the law which they must be presumed to have had in view when they executed it. * * * Americans and Englishmen, entering into a charter-party of an English ship for an ocean voyage, must be presumed to look to the general maritime law of the two countries, and not to the local law of the state

in which the contract was signed. If it is considered as a question of the remedy and relief to be judicially administered, the equity and admiralty jurisdiction of the courts of the United States, under the national Constitution and laws, is uniform throughout the Union, and cannot be limited in its extent, or controlled in its exercise, by the laws of the several states. *U. S.* v. *Howland*, 4 Wheat., 108; *Livingston* v. *Story*, 9 Pet., 632; *Russel* v. *Southard*, 12 How., 139; *Neves* v. *Scott*, 13 How., 268; *The Chusan*, 2 Story, 455; *The St. Lawrence*, 1 Back., 522; *The Lottawanna*, 21 Wall., 558; Rev. St., Sections 913, 914. The Circuit Court, therefore, rightly held that the charterers were liable only for the amount of damages which their breach of the contract had actually caused to the owner of the ship."

The case of *Grant Smith-Porter Ship Co.* v. *Rhode*, 42 Sup. Ct. Rep., 157, cited on page 28, and that of *State Industrial Commission* v. *Nordenholt Corporation et al.*, 42 Sup. Ct. Rep., 157, cited on page 42, of the petitioner's brief do not conflict in any way with the authorities relied upon by the respondent.

In the first case this Court held that the general employment of the libellant Rhode had no direct relation to navigation or commerce. The case was distinguished from *Southern Pacific Company* v. *Jensen, supra*, and the Court stated that the application of the local law, being the Oregon Workmen's Compensation Law, could not materially affect any rules of the sea whose uniformity is essential.

In the second case this Court decided that the New York Workmen's Compensation Act applied to the case of a deceased longshoreman, killed while he was working on the dock, because the general maritime law did not govern, under the circumstances.

The case of *Western Fuel Co.* v. *Garcia*, 42 Sup. Ct. Rep., 89 referred to in the *Grant Smith-Porter* case simply held that where a State Statute allowed an action for damages for death due to a wrongful act, the administrator could bring a suit in the admiralty court under the statute, where the deceased was killed in the hold of a vessel lying in navigable waters.

The Court, referring to the case of *Southern Pacific Company* v. *Jensen, supra*, stated at page 90:

> "And we further held that rights and liabilities in respect of torts upon the sea ordinarily depend upon the rules accepted and applied in admiralty courts wherever suit may be instituted."

The result of overturning the decision of the New York Court of Appeals in this case and holding that the remedy created by the Arbitration Law is within the saving clause of the Judicial Code would be a serious impairment of the uniformity in the application of the maritime law.

Consider briefly the subject of the present dispute. The petitioner claims that it is entitled to reimbursement for certain charter hire which it alleges that it paid to the respondent under protest on the charter of the steamship "Runa" and

for certain disbursements which it made while, as it claims, the "Runa" was off hire. Its contentions are that there was a breach of the charter party because the master is alleged not to have prosecuted the voyage with the utmost despatch, resulting in a delayed departure of the "Runa" from New York, so that she ran into a heavy storm which she would not otherwise have encountered; that there was a deficiency of stores resulting in the vessel being off hire for a certain length of time; that there was an unjustified deviation to the Azores and that the master took on an excess supply of coal at the Azores before the voyage back to St. John's, Newfoundland. One of the main questions to be decided in the case is whether the storm encountered by the "Runa" on her trip to St. John's, Newfoundland, was of such an unusual degree of severity as to necessitate her running before the wind into the Azores. The question will also arise as to who was responsible for the deficiency in the coal supply and to what extent if any such deficiency contributed to the difficulties experienced by the "Runa" in the storm.

If the remedy for the specific enforcement of the arbitration clause, provided by the Arbitration Law, is held applicable, the decision of the maritime questions necessary to a correct solution of the dispute will be placed in the hands of arbitrators.

The Arbitration Law, be it remembered, does not make the finding of the arbitrators a preliminary to some further hearing which might take place in a court, but the finding of the arbitrators is final and conclusive on the merits and their award cannot be vacated except on proof of fraud, corruption or other misconduct.

The Arbitration Law incorporates Sections 2365 to 2382 of the old New York Code of Civil Procedure. Section 2373 provides for the confirmation of the award of the arbitrators by the Court, and Section 2378 and the following sections provide for the entry of judgment upon the order of confirmation in the same manner as upon a referee's report in an action, and for the docketing of the judgment entered upon the award and the issuance of an execution thereon. The Code provides that after a judgment is entered on the award and docketed, it shall have the same force and effect as a judgment in any other action, and an appeal can be taken from it in the same manner as from any other judgmet. (The subject of arbitration is now covered by Sections 1448 to 1469 of the Civil Practice Act of New York.)

Once the proceeding has started, therefore, it goes through to a final conclusion. The rights and liabilities of the parties are determined by arbitrators, business men in the vast majority of cases, ignorant of the admiralty law and bound by no legal precedent.

If it is proper for New York to pass a statute of this nature, broad enough to afford suitors a new remedy in maritime disputes, what is there to prevent other States from passing similar or widely different statutes with the same object? Instead of having maritime disputes between parties decided according to the rules of the sea, for those rules would be applicable either in a common law or an admiralty court (*Chelentis* v. *Luckenbach Steamship Company, Incorporated, supra*), they would be decided by groups of individuals here and there who would make their own rules, without re-

gard to, or perhaps more truthfully, in ignorance of, the maritime law.

The danger of holding the remedy given by the Arbitration Law to be within the saving clause of the Judicial Code is apparent. A due regard for uniformity in the maritime law will, we feel certain, lead this Court to deny the petitioner's application.

It is perhaps worthy of note, in conclusion, that the respondent in this proceeding filed a libel in the United States District Court for the Southern District of New York on June 4, 1920, for the recovery of $4,518.99, balance of charter hire on the "Runa" for the particular voyage under consideration. The petitioner herein appeared in that action and filed an answer pleading the payment of $35,256.96 under protest. It also set up in paragraph seventeenth of its answer, a separate defense to the effect that it had made a demand on the Atlantic Fruit Company for arbitration pursuant to the New York Arbitration Law, and that the Atlantic Fruit Company had refused to arbitrate. The Atlantic Fruit Company filed exceptions to this defense as insufficient, and at the same time the Red Cross Line made a motion for a stay of the admiralty action pending the determination of the arbitration proceedings. Both motions were heard by Circuit Judge Julian W. Mack at the same time.

Judge Mack denied the motion of the Red Cross Line for a stay, and sustained the exceptions of the Atlantic Fruit Company to the defense based upon the Arbitration Law. The opinion is reported in 276 Fed., 319. (*Atlantic Fruit Co.* v. *Red Cross Line.*)

The petition for writ of certiorari should be denied.

Dated, New York, September 26, 1922.

Respectfully submitted,

JOHN W. CRANDALL,
Counsel for Respondent.

JOHN W. CRANDALL,
E. F. RAPALLO,
of Counsel.

36116

Supreme Court of the United States

OCTOBER TERM, 1924.

No. 112.

RED CROSS LINE,
Petitioner,
v.
ATLANTIC FRUIT COMPANY,
Respondent.

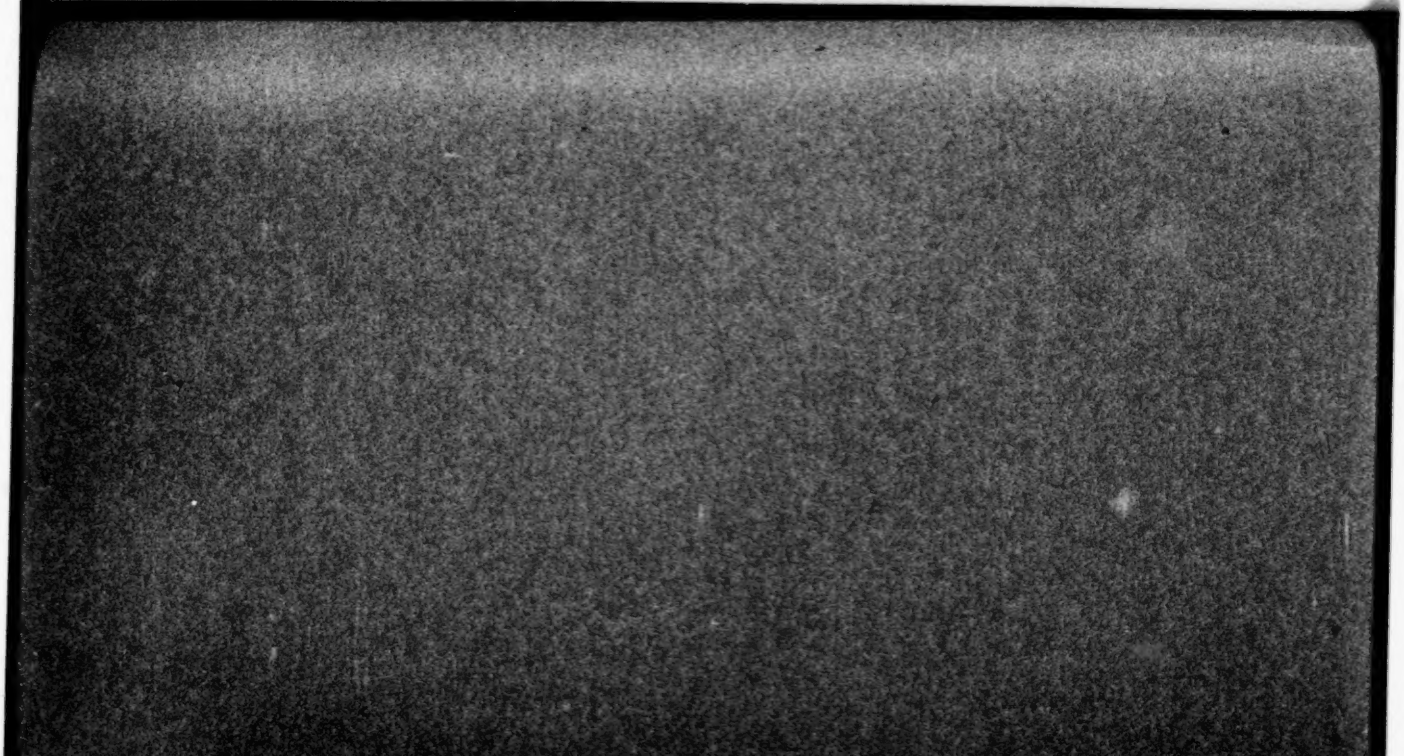
BRIEF FOR RESPONDENT ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

Hunt, Hill & Betts,
Attorneys for Atlantic Fruit Company.

John W. Griffith,
Counsel.

John W. Griffith,
Ewen Randle,
on the Brief.

Press of Stephen Daye, Inc., 25 Washington St., New York City.



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Supreme Court of the United States

OCTOBER TERM, 1923.

No. 112.

RED CROSS LINE,
Petitioner,

against

ATLANTIC FRUIT COMPANY,
Respondent.

BRIEF FOR RESPONDENT.

Statement of Facts.

This is a writ of certiorari to a judgment of the Supreme Court of the State of New York, entered upon a remittitur from the New York Court of Appeals, pursuant to a decision of the latter court reversing an order of the Appellate Division of the New York Supreme Court, First Department, and dismissing the proceedings of the petitioner. The order of the Appellate Division affirmed an order of Special Term, Part I of the New York Supreme Court, New York County, entered August 11, 1921,

directing the respondent, Atlantic Fruit Company, to proceed to the arbitration of a dispute arising out of a charter party of the steamship Runa and to appoint its arbitrator, pursuant to the Arbitration Law of the State of New York, Chapter 275 of the Laws of 1920.

On April 13, 1921, the petitioner served on the respondent, Atlantic Fruit Company, a copy of a verified petition accompanied by a notice that a motion would be made at Special Term, Part I of the New York Supreme Court, New York County, on April 21, 1921, for an order directing the respondent to proceed to arbitration of the petitioner's claim as set forth in the petition, pursuant to Chapter 275 of the Laws of 1920 (Record, pages 2, 3).

Article Fourth of the petition (page 3) sets up a charter party dated November 28, 1919, entered into in the City of New York, between the petitioner and respondent, whereby the respondent, the chartered owner of the Norwegian Steamship Runa, agreed to charter the vessel to the petitioner for a round trip between any safe port or ports in Canada or other British possessions not North of the St. Lawrence River, and/or the United States, at a charter hire of $25,000 per month.

Article Fifth of the petition (pages 3 and 4) sets up clause 3 of the charter party providing that in the event of loss of time from deficiency of men or stores, breakdown of machinery or damage preventing the working of the steamer for more than twenty-four hours at sea, the payment of the hire should cease until the vessel should be again in an efficient state to resume her service; also clause 11 of the charter party providing that the captain

should prosecute the voyage with the utmost despatch.

Article Sixth of the petition (page 4) sets up clause 23 of the charter party reading as follows:

> "That should any dispute arise between Owners and Charterers, the matters in dispute shall be referred to three persons in New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision, or that of any two of them, shall be final and for the purpose of enforcing any award, this agreement may be made a rule of court. * * *"

Article Eighth of the petition alleges that the master of the Runa did not prosecute the voyage with the utmost despatch in that the steamer was ready to sail from New York on the night of December 6, 1919, but that the master refused to proceed at that time, and delayed leaving until the following morning of December 7th; that the master when within approximately 100 miles of St. Johns, Newfoundland, the port of destination on the voyage, turned the Runa about and proceeded to the Azores, where the Runa was detained for twenty-one days, and that thirty-nine days were consumed on the voyage from New York to St. Johns, Newfoundland, instead of eight days, the normal running time; also that the Runa consumed an excess quantity of coal exceeding 298 tons (pages 4 and 5).

The petitioner further alleges in its petition that it was in ignorance of the true facts when it paid the charter hire, and accordingly paid the hire

under protest to prevent the withdrawal of the steamer from its service, and that by reason of the alleged failure of the master to prosecute the voyage with the utmost despatch, and the alleged deviation to the Azores, it is entitled to the return of the charter hire paid under protest, together with certain disbursements, amounting altogether to $35,256.96 (Articles Ninth and Tenth, page 5).

It is further alleged that the respondent failed and refused to pay the sum of $35,256.96, demanded by the petitioner, and denied and disputed its liability to pay such sum, with the result that a dispute and controversy thereby arose between the petitioner and the respondent (Articles Eleventh and Twelfth, page 5).

The petition further alleges a demand on the respondent for the arbitration of the dispute arising between the parties, as provided by the charter party, and the refusal of respondent to arbitrate. It is also alleged that the petitioner designated an arbitrator, but that the respondent refused to appoint its arbitrator (Articles Thirteenth-Seventeenth, pages 5 and 6).

The respondent refused to assume any responsibility for the payment to the petitioner of the sums demanded, and in response to the demand of the petitioner for arbitration, declined to arbitrate the dispute on the ground that if there was any liability it was not that of the respondent but of the Norwegian owner of the steamer who could not be brought into the controversy, except by petition, in the proper tribunal (Exhibit B-1 to petition, page 9, Exhibit E to petition, page 10).

Before the time set at Special Term for the hearing of the petition, the respondent appeared specially and removed the proceeding into the United

States District Court for the Southern District of New York, on the theory that it was a suit at law or equity arising under the Constitution and laws of the United States, and on the ground of diversity of citizenship between the parties (pages 18-22).

The petitioner then moved to remand the cause and it was subsequently remanded to the Supreme Court of New York, under an order entered in the office of the Clerk of the United States District Court for the Southern District of New York, on June 27, 1921 (page 22). The petitioner has insisted upon the printing of the removal proceedings in all of the records, including the present one, for what reason we do not know, as the removal proceedings have nothing to do with the merits of the dispute between the parties.

The petition of the Red Cross Line was then brought on for hearing before Mr. Justice William P. Burr at Special Term, Part I, on July 20, 1921. The respondent filed a verified answer to the petition denying its principal allegations as to the alleged failure of the master to prosecute the voyage with the utmost despatch, the deviation to the Azores, etc., and setting up a separate defense alleging that the dispute which had arisen between the parties was a maritime one and hence within the admiralty and maritime jurisdiction of the United States Courts, and consequently that the Arbitration Law of New York could not have been intended to apply to such a controversy, but that if it was intended to so apply, it is repugnant to Article III, Section 2, of the Constitution of the United States, to Section 24 of the Judicial Code of the United States, Subdivision Third, and to Section 256 of the Judicial Code of the United States, Subdivision Third (pages 12-16).

Affidavits of T. O. Muller, president of Atlantic Fruit Company, and John W. Crandall, of counsel for the company, were also submitted by the respondent in opposition to the petitioner's application. These affidavits also raised the question of the constitutionality of the Arbitration Statute (pages 16-18).

After hearing argument of counsel for and against the petitioner's application, Mr. Justice Burr granted the motion, and by an order entered August 11, 1921, directed the respondent to proceed to arbitration and appoint its arbitrator on or before August 20, 1921 (pages 1, 2).

The respondent appealed from the order of Mr. Justice Burr to the Appellate Division of the New York Supreme Court, First Department, which Court, in a judgment filed December 9, 1921, unanimously affirmed the order (pages 30, 31).

The respondent thereupon appealed to the Court of Appeals of the State of New York from the order of the Appellate Division, and the Court of Appeals (Opinion, Hogan, J., pages 36-40, *Matter of Red Cross Line* v. *Atlantic Fruit Co.*, 233 New York, 373), unanimously reversed the order appealed from, dismissed the proceedings and remitted the record to the Supreme Court of the State of New York, and a judgment in favor of the respondent was duly entered upon such remittitur (pages 32-34).

The petitioner then applied to this Court for a writ of certiorari, which application was granted and the writ was issued to the Supreme Court of the State of New York and filed December 26, 1922.

POINT I.

The dispute between the parties herein arose out of a maritime contract and hence is within the exclusive jurisdiction of the admiralty courts except as a common law remedy may have been saved to the petitioner. The New York Arbitration Law, under which this proceeding is brought, has provided a new remedy, unknown to the common law, for the adjustment of controversies. The New York Court of Appeals therefore properly dismissed the petition of the Red Cross Line on the ground that the Legislature was without power to include maritime disputes within the scope of the Arbitration Law and hence could not be presumed to have had such an intention.

We start with the proposition that a charter party of a vessel is a maritime contract and accordingly within the admiralty and maritime jurisdiction of the United States Courts, except for the saving clause of the Judicial Code hereafter discussed. On this point there can be no argument.

In *Morewood et al.* v. *Enequist,* 23 Howard, 491, this Court stated at page 493, as follows:

> "In the argument in this court, the counsel, without abandoning the original defense, have expended much learning and ingenuity in an attempt to demonstrate that a court of admir-

> alty in this country, like those of England, has no jurisdiction over contracts of charter party or affreightment. They do not seem to deny that these are maritime contracts, according to any correct definition of the terms, but rather require us to abandon our whole course of decision on this subject, and return to the fluctuating decisions of English common-law judges, which, it has been truly said, 'are founded on no uniform principle, and exhibit illiberal jealousy and narrow prejudice.'
>
> The errors of those decisions have mostly been corrected by legislation in the country of their origin; they have never been adopted in this.
>
> We do not feel disposed to be again drawn into the discussion of the arguments which counsel have reproduced on this subject."

The Court then referred to its decision in the cause of *New Jersey Steamboat Company* v. *The Merchants' Bank of Boston,* and stated as follows, at page 493:

> "The whole subject was most thoroughly investigated both by counsel and the Court. Everything connected with the history of courts of admiralty, from the reign of Richard the Second to the present day—everything which the industry, learning, and research, of most able counsel could discover, was brought to our notice. We then decided that charter parties and contracts of affreightment are 'maritime contracts' within the true meaning and construction of the Constitution and act

of Congress, and cognizable in courts of admiralty by process either in *rem* or in *personam.*"

In *Metropolitan S. S. Co.* v. *Pacific Alaska Nav. Co.*, 260 Fed., 973, a libel was filed upon an alleged charter party with the respondent and the respondent excepted on the ground that the contract was not a maritime one. The Court overruled the exceptions and stated as follows, at page 977:

"The initial defense raised by the respondent is that the contract stated is not a maritime contract. I cannot sustain this defense. The part of the libel to which I have called attention clearly presents a case of the hiring of the two ships for the carriage of persons and property on the Pacific Coast, between certain designated points, in navigable waters. It clearly presents something more than a mere foundation for future maritime contracts, to be made by the respondent, for the carriage of passengers and freight upon the ships. It states a case of the hiring of these ships to a charterer, such charterer to have exclusive possession of them, to keep them in repair, carry passengers and freight with them between certain designated ports upon the high seas, to preserve their tackle, apparel and furniture, and, upon termination of the contract, to have on board, for the benefit of the libelants, certain enumerated property. It states a failure on the part of the respondent to carry out the terms of this contract. I think this agreement, as stated, meets the requirements of a charter

> party. It is a maritime contract, entitled to be adjudicated in a court of admiralty. As Mr. Benedict has said, it is the substance of an undertaking, and not the mere form of words, which creates liability and confers jurisdiction. The substance of the undertaking, here stated, has reference to a specific, determined, maritime service of two ships hired to the respondent for the carriage of persons and property, upon navigable waters."

In *Dunbar* v. *Weston*, 93 Fed., 472, the Court said:

> "This is an action in *personam* to recover damages for the breach of a charter party. Such a charter is a maritime contract within the jurisdiction of this Court."

It is also unquestionable that the petitioner and the respondent are parties to a dispute involving and arising out of a charter party of the steamship Runa. Had the petitioner begun an action against the respondent at common law or in admiralty upon the claim appearing in its petition herein, its allegations would have been substantially identical with those of its present petition.

The petitioner alleges the entering into of the charter party between it and the respondent, sets up the clause providing that the master shall prosecute the voyage with the utmost dispatch and the "off-hire" clause providing that the hire of the vessel shall cease in the event of loss of time from deficiency of men or stores, etc., for more than 24 hours at sea. The petitioner alleges a breach of

the charter party in the alleged failure of the master of the Runa to prosecute the voyage with the utmost despatch, resulting in a delayed departure, it is claimed, from New York, which in turn was the cause of the steamer encountering a heavy storm; that there was a deficiency of stores which brought into operation the "off-hire" clause of the charter party for a certain definite length of time; that the master of the Runa made an unwarranted deviation to the Azores, far out of the normal course of a voyage between New York and St. Johns, Newfoundland, and while at the Azores took on an excessive supply of coal for the voyage back to St. Johns. The petitioner claims that it paid the charter hire for the alleged "off-hire" period under protest and in ignorance of the true state of facts, and also that it made a large number of disbursements which, under the circumstances, were for the owner's account. For these payments and expenditures it demands reimbursement.

Instead, however, of filing a libel against the respondent, or beginning a common law action, as was permissible under the saving clause of the Judicial Code, it instituted this proceeding under the Arbitration Law of New York to compel the respondent to arbitrate the controversy which had arisen, pursuant to the arbitration clause of the charter party.

The right of the legislatures of the several States to pass laws applying to or in any way affecting matters of a maritime nature is strictly limited. Were it not for the saving clause of the Judicial Code hereafter referred to, the admiralty courts would have exclusive jurisdiction over all maritime causes.

Section II of Article III of the Constitution of the United States provides in part as follows:

> "The judicial power shall extend * * * to all cases of admiralty and maritime jurisdiction."

Judicial Code, Section 24, U. S. Comp. Stat., Sec. 991, Subdivision Third, provides as follows:

> "The district courts shall have original jurisdiction as follows: * * * Third. Of all civil causes of admiralty and maritime jurisdiction saving to suitors in all cases the right of a common law remedy where the common law is competent to give it."

Section 256 of the Judicial Code, U. S. Comp. Stat., Section 1233, Subdivision Third, provides as follows:

> "The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several States; * * *
> Third. Of all civil causes of admiralty and maritime jurisdiction; saving to suitors, in all cases, the right of a common-law remedy, where the common-law is competent to give it."

The saving clause of the Judicial Code refers on its face to remedies, and this has been construed to mean common-law remedies and not remedies in common-law courts.

In *The Moses Taylor,* 4 Wallace, 411, Mr. Justice Field, delivering the opinion of the Court, and

considering the saving clause which is now embodied in Section 24 of the Judicial Code, stated as follows at page 431:

> "The cause before us is not within the saving clause of the ninth section. That clause only saves to suitors 'the right of a common-law remedy, where the common-law is competent to give it.' *It is not a remedy in the common-law courts which is saved, but a common-law remedy.* A proceeding in *rem*, as used in the admiralty courts, is not a remedy afforded by the common-law; it is a proceeding under the civil law. When used in the common-law courts, it is given by statute." (Italics ours.)

In *Chelentis* v. *Luckenbach, etc.*, 247 U. S., 372, the Supreme Court considered the saving clause in question, and stated as follows at page 384:

> "The distinction between rights and remedies is fundamental. A right is a well-founded or acknowledged claim. A remedy is the means employed to enforce a right or redress an injury. (Bouvier's Law Dictionary.) Plainly, we think that under the saving clause a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized at common-law, but we find nothing therein which reveals an intention to give the complaining party an election to determine whether the defendant's liability shall be measured by common-law standards rather than those of the maritime law."

This Court has held that the Workmen's Compensation Act of New York provided a *remedy* and was

unconstitutional so far as such remedy was designed to cover matters of a maritime nature.

In *Southern Pacific Company* v. *Jensen*, 244 U. S., 205, the Court stated as follows at page 218:

> "*The remedy which the Compensation Statute attempts to give is of a character wholly unknown to the common-law, incapable of enforcement by the ordinary processes of any court and is not saved to suitors from the grant of exclusive jurisdiction.*" (Italics ours.)

In *Knickerbocker Ice Company* v. *Stewart*, 253 U. S., 149, the Court stated at page 158:

> "We also pointed out that the saving clause taken from the original Judiciary Act had no application, since, at most, it only specified common-law remedies, *whereas the remedy prescribed by the compensation law was unknown to the common-law and incapable of enforcement by the ordinary processes of any court.*" (Italics ours.)

The Court also stated at page 161:

> "The distinction between the indicated situation created by the Constitution relative to maritime affairs and the one resulting from the mere grant of power to regulate commerce without more, should not be forgotten. Also, it should be noted that federal laws are constantly applied in state courts—unless inhibited their duty so requires. Constitution, Article VI, Clause 2; Second Employers' Liability Cases, 223 U. S., 1, 55. Consequently

mere reservation of partially concurrent cognizance to such courts by an act of Congress conferring an otherwise exclusive jurisdiction upon national courts, could not create substantive rights or obligations or indicate assent to their creation by the States."

And again at page 162:

> *"The usual function of a saving clause is to preserve something from immediate interference—not to create.* * * *" (Italics ours.)

In the instant case the petitioner relies upon the remedy given by the Arbitration Law of New York. (Chapter 72 of the Consolidated Laws of New York; Chapter 275 of the Laws of New York of 1920.)

Article 2, Section 2 of this law provides as follows:

> **"Validity of arbitration agreements.** A provision in a written contract to settle by arbitration a controversy thereafter arising between the parties to the contract, or a submission hereafter entered into of an existing controversy to arbitration pursuant to title eight of chapter seventeen of the code of civil procedure, or article eighty-three of the civil practice act, shall be valid, enforcible and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract."

Section 3 permits the party aggrieved by the refusal of the other party to the arbitration agreement

to arbitrate, to petition the Supreme Court or a judge thereof, for an order directing that such arbitration proceed in the manner provided for in the contract, upon eight days' notice to the adverse party. The Court, after a hearing, if the existence of the arbitration contract is admitted, is obliged thereupon to make an order directing the parties to proceed to arbitration in accordance with the terms of the arbitration agreement. Section 4 provides that in the event of the failure of a party to name an arbitrator, the Court shall designate an arbitrator on his behalf.

Article 3, Section 8 of the law incorporates into the act Sections 2365 to 2382 of the New York Code of Civil Procedure. Section 2373 of the Code provides for the confirmation of the award of the arbitrators by the Court, and Section 2378 and the following sections provide for the entry of judgment upon the order of confirmation in the same manner as upon a referee's report in an action and for the docketing of the judgment entered upon the award and the issuance of an execution thereon. The Code provides that after the judgment on the award has been entered and docketed it shall have the same force and effect as a judgment in any other action and an appeal can be taken from it in the same manner as from any other judgment. (The subject of arbitration is now covered by Sections 1448 to 1469 of the new Civil Practice Act of New York.)

That the New York Arbitration Law created a new remedy was decided by the New York Court of Appeals even before the present decision, in the case of *Matter of Berkovitz* v. *Arbib & Houlberg* and *Spiritusfabriek Astra of Amsterdam, Holland*

v. *Sugar Products Company*, 230 N. Y., 261, where it was stated as follows, at page 270:

> "The common-law limitation upon the enforcement of promises to arbitrate is part of the law of remedies * * *. The rule to be applied is the rule of the forum. Both in this Court and elsewhere, the law has been so declared. Arbitration is a form of procedure whereby differences may be settled. It is not a definition of the rights and wrongs out of which differences grow. This statute did not attach a new obligation to sales already made. It vindicated by a new method the obligation then existing."

The Court further stated, at page 272:

> "Here the wrong to be redressed is the rejection of merchandise in violation of a contract. Such a wrong had a remedy for centuries before the statute. All that the statute has done is to make two remedies available when formerly there was one."

The Court of Appeals in its opinion in the present case (233 New York, 373), reiterated its previous construction of the purpose and effect of this statute.

Mr. Justice Hogan who wrote the opinion stated at page 381:

> "The section of the Arbitration Law (Section 3) under which the order herein was granted has been construed by us as a statutory legal remedy of a character unknown to

> the common law (Matter of *Berkovitz* v. *Arbib & Houlberg, Inc.*, 230 N. Y., 261); it, therefore, is not embraced within the exceptions contained in the Judicial Code."

This Court has already in several instances recognized the binding effect of the construction and interpretation of a State statute by the highest court of that State.

In *Quong Ham Wah Co.* v. *Industrial Accident Commission of the State of California, et al.*, 255 U. S., 445, wherein the highest court of the State of California construed its Workmen's Compensation Law to apply to residents and non-residents indiscriminately, this Court through Mr. Chief Justice White, stated as follows at page 448:

> "But it is elementary that this Court is without authority to review and revise the construction affixed to a state statute as to a state matter by the court of last resort of the State. * * * It is hence obvious that the proposition upon which alone jurisdiction to entertain the writ can be based is so wanting in foundation as to be frivolous and therefore to impose upon us the duty to dismiss the cause for want of power to entertain it."

Again in *Ward & Gow* v. *Himan Krinsky and State Industrial Commission*, 66 L. Ed., page 616, in which the validity of the extension by the legislature of New York of the benefits of the Workmen's Compensation Act to persons in such a category as salesmen in the newsstands in the New York subway stations was in question, Mr. Justice Pitney stated as follows, at page 618:

> "In the exercise of our appellate jurisdiction we are bound by the construction of the state law adopted by its court of last resort; hence, for present purposes it must be taken as settled that the legislature intended the Compensation Law, as amended, to apply to an employee in Krinsky's situation, precisely as if it were so declared in the words of the statute. Our function is confined to determining whether, as so construed and as applied to the concrete facts of the case, the statute contravenes the limitations imposed by the 14th Amendment upon state action."

Indeed it is highly questionable, in view of the foregoing authorities, whether there is anything at all for this Court to review, inasmuch as the Court of Appeals, by holding that the Arbitration Law was not intended to apply to maritime controversies, has left nothing of a federal nature for this Court to consider. Surely the conclusion of the Court of Appeals that the present dispute is a maritime one does not present a federal question for review.

It is true that this Court in *State Industrial Commission of the State of New York* v. *Nordenholt Corporation, et al*, 259 U. S., 263, did review on a writ of certiorari the decision of the New York Court of Appeals that a stevedore, killed on a dock while unloading a vessel, was employed in a maritime service and hence a claim for allowance could not be made by his mother under the Workmen's Compensation Act. The case was reviewed, however, because the Court of Appeals had proceeded upon an erroneous conclusion as to the effect of the decisions in *Southern Pacific Co.* v. *Jensen*, *Knickerbocker Ice Company* v. *Stewart*, and *Clyde S. S. Co.* v. *Walker*.

The Court of Appeals in the present proceeding has not passed upon the constitutionality of the Arbitration Law one way or the other, but has simply held that the act does not apply to maritime controversies because such an extension of its scope was outside of the power of the legislature.

If the Court of Appeals has erred in its decision that the dispute between the petitioner and the respondent is a maritime one, the petitioner has thereby in no way been deprived of any constitutional right, nor have its rights under the federal laws suffered any abridgement whatsoever.

We therefore earnestly suggest for the consideration of the Court the question as to whether the New York Court of Appeals has not finally disposed of the whole matter by limiting the scope of the statute to disputes outside of the jurisdiction of the admiralty courts.

It would therefore appear unnecessary to review the decisions of this Court which have defined to what extent a State legislature is authorized to enact laws affecting matters of a maritime nature, but should this Court decide to review the question *de novo*, in spite of the holding of the New York Court of Appeals, the authorities to be cited will be found to amply support and justify the conclusion of that Court.

Mr. Justice Hogan of the Court of Appeals stated in the instant case (*Matter of Red Cross Line* v. *Atlantic Fruit Co., supra*), at page 382:

> "In the present case, the agreement to arbitrate which is sought to be enforced is part of a maritime contract. It is contained in a charter party and such clause is void in the federal forum. (*United States Asphalt Re-*

fining Co. v. *Trinidad Lake Petroleum Co.*, 222 Fed. Rep., 1006, and cases cited therein.)

To sustain the arbitration clause and enforce the same in the state courts would deny to the federal court the exclusive jurisdiction with which Congress has clothed it, and likewise destroy a rule of uniformity (*So. Pac. Co.* v. *Jensen*, 244 U. S., 205; *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S., 149)."

In *The Chusan*, 5 Fed., Cases, No. 2717, Mr. Justice Story, in considering a libel for supplies furnished to a bark in connection with a local law of the State of New York giving a lien for repairs, supplies, etc., stated at page 682:

"The truth is, that the admiralty and maritime jurisdiction of the courts of the United States, given by the Constitution, covers not merely the cognizance of the case, but the jurisdiction and principles, by which it is to be administered. It covers the whole maritime law, applicable to the case in judgment, without the slightest dependence upon or connection with the local jurisprudence of the state on the same subject.

The subject matter of admiralty and maritime law is withdrawn from state legislation, and belongs exclusively to the national government and its proper functionaries."

The Court also said at page 684:

"It cannot be that a state has a right to step in, and by way of complement fill up by its own legislation, what is not actually occupied by that of congress."

In *The Hine* v. *Trevor*, 4 Wall., 555, a collision occurred between two steamboats on the Mississippi River and later the owners of one of them, the "Sunshine," caused the "Hine" to be seized under a State court proceeding. The State of Iowa gave a lien by statute for injuries to property caused by vessels. The owners of the "Hine" interposed a plea to the jurisdiction of the State court. The case finally came before the Supreme Court on a writ of error. The Supreme Court held that the State court was without jurisdiction and stated as follows at page 571:

> "2. It is said that the statute of Iowa may be fairly construed as coming within the clause of the ninth section of the act of 1789, which 'saves to suitors, in all cases, the right of a common-law remedy where the common law is competent to give it.'
>
> But the remedy pursued in the Iowa courts, in the case before us, is in no sense a common-law remedy. It is a remedy partaking of all the essential features of an admiralty proceeding in *rem*. The statute provides that the vessel may be sued and made defendant without any proceeding against the owners, or even mentioning their names. That a writ may be issued and the vessel seized on filing a petition similar in substance to a libel. * * *
>
> While the proceeding differs thus from a common-law remedy, it is also essentially different from what are in the West called suits by attachment, and in some of the other States foreign attachments. * * *
>
> Such actions may, also, be maintained in *personam* against a defendant in the common-

law courts, as the common law gives, all in consistence with the grant of admiralty powers in the ninth section of the Judiciary Act.

But it could not have been the intention of Congress, by the exception in that section, to give the suitor all such remedies as might afterwards be enacted by State statutes, for this would have enabled the States to make the jurisdiction of their courts concurrent in all cases, by simply providing a statutory remedy for all cases. Thus the exclusive jurisdiction of the Federal Courts would be defeated. In the act of 1845, where Congress does mean this, the language expresses it clearly, for after saving to the parties, in cases arising under that act, a right of trial by jury, and the right to a concurrent remedy at common law, where it is competent to give it, there is added, 'any concurrent remedy which may be given by the State laws where such steamer or other vessel is employed'" (Italics ours).

In *Brookman* v. *Hamill*, 43 N. Y., 554, an action on a bond given in an attachment proceeding permitted by a State statute to enforce a claim for wharfage, it was held by the Court of Appeals of New York that such a contract was maritime and that an attempt by the State courts to enforce it by a remedy unknown to the common law was void. Speaking of the Judicial Code, Section 24, the Court stated at page 557:

"This Act absolutely divests the state tribunals of jurisdiction to enforce maritime claims or contracts subject only to the proviso which saves to suitors the right in such cases to pur

> sue in the state courts such common law remedies as the common-law is competent to give. It is impossible to escape the conclusion that any state law which attempts to provide for the enforcement of a maritime claim or contract by any but a common law remedy infringes upon the exclusive jurisdiction of the Federal Courts over that class of cases and is as clear a violation of the Federal compact as would be a law providing for the enforcement by state tribunals of the rights of patentees or any other description of claims exclusively cognizable in the courts of the United States" (Knapp Stout & Co. v. McCaffrey, 177 U. S., 638).

In *The Lotawanna*, 21 Wallace, 558, this Court considered the question whether a State statute giving a lien for supplies, repairs and materials supplied to a vessel in her home port was enforceable in a United States Court of Admiralty when such a lien had not as yet been given expressly by the general maritime law. The Court held that such a lien was valid in the absence of any action on the part of Congress, because the subject matter of the lien did not require the exclusive exercise of the power of Congress to regulate commerce.

On the question of the general system of maritime law, the Court stated as follows at page 574:

> "That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Con-

> stitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction.'"

And again at page 575:

> "One thing, however, is unquestionable. The Constitution must have referred to a system of law co-extensive with, and uniform in, the whole country. It certainly could not have been the intention to place the rules and limits of the maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states."

In *The J. E. Rumble*, 148 U. S., 113, this Court held that in deciding a question of priority between a mortgage on a vessel and a lien for repairs given by State statutes, it was not controlled by the decisions of the State courts and stated as follows:

> "The admiralty and maritime jurisdiction is conferred on the courts of the United States by the constitution and cannot be enlarged or restricted by the legislation of a state."

Not only have the States no power to enact laws giving to suitors an admiralty remedy such as a suit in *rem*, but they have no authority to pass any

law regulating or affecting maritime matters which may tend to impair that uniformity which is so essential to the application of the maritime law through all of the States.

In *Union Fish Company* v. *Erickson*, 248 U. S., 308, an action was brought in the admiralty court of the Northern District of California on a contract to act as master of the respondent's vessel. The contract in question was an oral one made in California and the respondent pleaded the California Statute of Frauds providing that oral contracts not to be performed in one year are void. The Court held that the California Statute could not control the general maritime law and stated as follows at page 312:

> "We have, then, a maritime contract for services to be performed principally upon the sea, and the question is, can such an engagement be nullified by the local laws of a state where the contract happens to be entered into, so as to prevent its enforcement in an admiralty court of the United States?"

The Court further stated at page 313:

> "The maritime law controlled in this respect and was not subject to limitations because the particular engagement happened to be made in California."

And again at page 314:

> "If one state may declare such contracts void for one reason, another may do likewise for another. Thus the local law of a state may

> deprive one of relief in a case brought in a court of admiralty of the United States upon a maritime contract, and the uniformity of rules governing such contracts may be destroyed by perhaps conflicting rules of the states."

In *Southern Pacific Company* v. *Jensen*, 244 U. S., 205, this Court held that the New York Workmen's Compensation Act did not apply to a person engaged in stevedoring work aboard a vessel. The Court stated that the remedy given by the State statute did not come within the saving clause of the Judicial Code and held the statute unconstitutional as applied to maritime matters, stating as follows at page 214:

> "Article III, S. 2, of the Constitution extends the judicial power of the United States 'To all cases of admiralty and maritime jurisdiction'; and Article I, S. 8, confers upon the Congress power 'To make all laws which may be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States or in any department or officer thereof.' Considering our former opinions, it must now be accepted as settled doctrine that in consequence of these provisions Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country. * * * And further, that in the absence of some controlling statute the general maritime law as accepted by the Federal Courts constitutes part of our national law applicable to matters within the admiralty and maritime jurisdiction."

The Court further stated as follows at page 216:

"In view of these constitutional provisions and the federal act it would be difficult, if not impossible to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation. That this may be done to some extent cannot be denied. A lien upon a vessel for repairs in her own port may be given by state statute, * * * and the right given to recover in death cases * * *. Equally well established is the rule that state statutes may not contravene an applicable act of Congress or affect the general maritime law beyond certain limits. They cannot authorize proceedings in *rem* according to the course in admiralty * * * nor create liens for materials used in repairing a foreign ship. * * * And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself. These purposes are forcefully indicated in the foregoing quotations from *The Lotawanna*.

A similar rule in respect to interstate commerce deduced from the grant to Congress of power to regulate it is now firmly established.

> 'Where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the States, such as transportation between the States, including the importation of goods from one State into another, Congress can alone act upon it and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free.' * * * And the same character of reasoning which supports this rule, we think, makes imperative the stated limitation upon the power of the States to interpose where maritime matters are involved."

The Court also stated at page 217:

> "If New York can subject foreign ships coming into her ports to such obligations as those imposed by her Compensation Statute, other States may do likewise. The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the States and with foreign countries would be seriously hampered and impeded."

In *Knickerbocker Ice Company* v. *Stewart*, 253 U. S., 149, this Court passed upon the amendment to Section 24 of the Judicial Code, adding to the saving clause a reservation to claimants of rights and remedies under the Workmen's Compensation Law of any State and held such amendment unconstitutional as an attempt by Congress to delegate powers granted to it by the Constitution, which, in their very nature, were non-dele-

gable. The Court referred to the cases of *Southern Pacific Company* v. *Jensen, supra,* and *Union Fish Company* v. *Erickson, supra,* and stated as follows at page 160:

> "As the plain result of these recent opinions and the earlier cases upon which they are based, we accept the following doctrine: The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law and empowered Congress to legislate in respect to them and other matters within the admiralty and maritime jurisdiction. Moreover, it took from the States all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations. To preserve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within control of the Federal Government was the fundamental purpose; and to such definite end Congress was empowered to legislate within that sphere.
>
> Since the beginning, Federal courts have recognized and applied the rules and principles of maritime law as something distinct from laws of the several States— not derived from or dependent on their will. The foundation of the right to do this, the purpose for which it was granted, and the nature of the system so administered, were distinctly pointed out long ago."

The Court further stated as follows at page 164:

> "And so construed, we think the enactment is beyond the power of Congress. Its power to legislate concerning rights and liabilities within the maritime jurisdiction and remedies for their enforcement, arises from the Constitution, as above indicated. The definite object of the grant was to commit direct control to the Federal Government; to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation; and to establish, so far as practicable, harmonious and uniform rules applicable throughout every part of the Union.
>
> Considering the fundamental purpose in view and the definite end for which such rules were accepted, we must conclude that in their characteristic features and essential international and interstate relations, the latter may not be repealed, amended or changed except by legislation which embodied both the will and deliberate judgment of Congress. The subject was intrusted to it to be dealt with according to its discretion—not for delegation to others."

And finally at page 166:

> "Obviously if every State may freely declare the rights and liabilities incident to maritime employment, there will at once arise the confusion and uncertainty which framers of the Constitution both foresaw and undertook to prevent."

In *Chelentis* v. *Luckenbach Steamship Company, Incorporated*, 247 U. S., 372, the petitioner, who was employed as a fireman on the steamship "J. L. Luckenbach," was knocked down by a wave and sustained a broken leg while engaged in the performance of his duties on the deck at sea during a heavy wind. When the vessel arrived at her destination he was placed in a marine hospital and his leg amputated. He afterwards commenced an action in the New York Supreme Court, New York County, for full indemnity for his damages, stating that his injuries resulted from a negligent and improvident order of a superior officer. The defendant removed the action to the United States District Court and there insisted that inasmuch as the work of the seaman was of a maritime nature maritime rules should be applied on the question of damages. The Court applied such rules and directed a verdict for the defendant which was affirmed by the Circuit Court of Appeals for the Second Circuit and later by this Court.

The Supreme Court, Mr. Justice McReynolds delivering the opinion, quoting from the opinion of the Circuit Court of Appeals in the same case, stated as follows, at page 379:

> " 'The contract of a seaman is maritime and has written into it those peculiar features of the maritime law that were considered in the case of *The Osceola* (189 U. S., 158); and although, because of these peculiarities, such contracts are almost invariably litigated in admiralty courts, still the contract must be the same in every court, maritime or common law. The only difference between a proceeding

in one court or the other would be that the remedy would be regulated by the *lex fori*. If a seaman who had been locked up or put in irons for disobedience of orders were to sue the master for damages in a court of common law, he could not recover like a shore servant, such as a cook or chauffeur, who had received the same treatment. So a seaman bringing suit in a common law court for personal injuries could recover, even if guilty of contributory negligence, although a shore servant suing in the same court could not; and a seaman suing in a common law court for personal injuries could recover (except in the case of unseaworthiness of the vessel or failure to give proper care and medical attention) only wages to the end of the voyage and the expenses for maintenance and cure for a reasonable time thereafter, whereas in a similar case a shore servant would be entitled to recover full indemnity. Therefore, by virtue of the inherent nature of the seaman's contract, the defendant's negligence and the plaintiff's contributory negligence were totally immaterial considerations in this case; the sole question for the jury to determine being whether the plaintiff was entitled to recover because he had not received from the defendant his wages to the end of the voyage and the expense for his maintenance and cure for a reasonable time thereafter.' "

The Court further stated as follows, at page 382:

"The work about which petitioner was engaged is maritime in its nature; his employ-

ment was a maritime contract; the injuries received were likewise maritime and the parties' rights and liability were matters clearly within the admiralty jurisdiction. *Atlantic Transportation Co.* v. *Imbrovek*, 234 U. S., 52, 59, 60. And unless in some way there was imposed upon the owners a liability different from that prescribed by maritime law, petitioner could properly demand only wages, maintenance and cure. Under the doctrine approved in *Southern Pacific Co.* v. *Jensen*, no State has power to abolish the well-recognized maritime rule concerning measure of recovery and substitute therefor the full indemnity rule of the common law. Such a substitution would distinctly and definitely change or add to the settled maritime law; and it would be destructive of the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states."

In *Watts* v. *Camors*, 115 U. S., 353 (6 Supreme Court Reporter, 91), this Court had under consideration a charter party which contained a clause binding the parties to the true performance of the agreement in the penal sum of the estimated amount of freight. The Civil Code of Louisiana had been pleaded on the question of the stipulated damages.

The Court disregarded the Louisiana Statute and stated as follows, at page 95:

"But the law of Louisiana does not govern this question, whether it is treated as a question of construction of the contract of the parties, or as a question of judicial remedy.

If it is considered as depending upon the intent of the parties as manifested by their written contract, the performance of that contract is to be regulated by the law which they must be presumed to have had in view when they executed it. * * * Americans and Englishmen, entering into a charter-party of an English ship for an ocean voyage, must be presumed to look to the general maritime law of the two countries, and not to the local law of the state in which the contract was signed. If it is considered as a question of the remedy and relief to be judicially administered, the equity and admiralty jurisdiction of the courts of the United States, under the National Constitution and laws, is uniform throughout the Union, and cannot be limited in its extent, or controlled in its exercise, by the laws of the several states. *U. S.* v. *Howland*, 4 Wheat, 108; *Livingston* v. *Story*, 9 Pet., 632; *Russel* v. *Southard*, 12 How., 139; *Neves* v. *Scott*, 13 How., 268; *The Chusan*, 2 Story, 455; *The St. Lawrence*, 1 Back., 522; *The Lottawanna*, 21 Wall., 558; Rev. St., Sections 913, 914. The Circuit Court, therefore, rightly held that the charterers were liable only for the amount of damages which their breach of the contract had actually caused to the owner of the ship."

In *Workman* v. *New York City, Mayor, Aldermen and Commonalty*, 179 U. S., 552, Workman, the libellant, was the owner of a barkentine which was struck and injured while moored to a dock in the East River in New York City, by a steam fireboat of the city, which at that time was running into a slip to extinguish a fire in a warehouse. The

libellant filed his libel personally against the Aldermen and Commonalty of the City of New York, and it was subsequently amended to make the New York Fire Department and the navigator of the fire-boat parties respondent.

The United States District Court held that under the local law of New York the city was liable for negligent management of a fire-boat, but this decision was reversed by the Circuit Court of Appeals, which held that the city, in operating the fire-boat, performed a governmental and not a corporate function, and therefore under the local decisions could not be held liable.

This Court, however, held that the maritime law and not the local law prevailed, and Mr. Justice White, delivering the opinion, stated at page 557:

> "The proposition then which we must first consider may be thus stated: Although by the maritime law the duty rests upon courts of admiralty to afford redress for every injury to person or property where the subject-matter is within the cognizance of such courts and when the wrongdoer is amenable to process, nevertheless, the admiralty courts must deny all relief whenever redress for a wrong would not be afforded by the local law of a particular State or the course of decisions therein. And this, not because, by the rule prevailing in the State, the wrongdoer is not generally responsible and usually subject to process of courts of justice, but because in the commission of a particular act causing direct injury to a person or property it is considered, by the local decisions, that the wrongdoer is endowed with all the attributes of sovereignty, and therefore

as to injuries by it done to others in the assumed sovereign character, courts are unable to administer justice by affording redress for the wrong inflicted.

The practical destruction of a uniform maritime law which must arise from this premise, is made manifest when it is considered that if it be true that the principles of the general maritime law giving relief for every character of maritime tort where the wrongdoer is subject to the jurisdiction of admiralty courts, can be overthrown by conflicting decisions of state courts, it would follow that there would be no general maritime law for the redress of wrongs, as such law would be necessarily one thing in one State and one in another; one thing in one port of the United States and a different thing in some other port. As the power to change state laws or state decisions rests with the state authorities by which such laws are enacted or decisions rendered, it would come to pass that the maritime law affording relief for wrongs done, instead of being general and ever abiding, would be purely local—would be one thing today and another thing tomorrow. That the confusions to result would amount to the abrogation of a uniform maritime law is at once patent. And the principle by which the maritime law would be thus in part practically destroyed would besides apply to other subjects specially confided by the Constitution to the Federal Government. Thus, if the local law may control the maritime law, it must also govern in the decision of cases arising under the patent, copyright and commerce clauses of the Constitution. It would result that a

municipal corporation, in the exercise of administrative powers which the state law determines to be governmental, could with impunity violate the patent and copyright laws of the United States or the regulations enacted by Congress under the commerce clause of the Constitution, such as those concerning the enrollment and licensing of vessels. This follows if a corporation must for a wrong by it done, be allowed to escape all reparation upon the theory that, though ordinarily liable to sue and be sued, it possessed in the particular matter the freedom from suit which attaches to a sovereign State."

See also:

The Thielbek (C. C. A., Ninth Circuit), 241 Fed., 209;
Rodgers & Hagerty, Inc. v. *City of New York* (C. C. A., Second Circuit), 285 Fed., 362.

At this point it will be of interest to consider the decision of Circuit Judge Julian W. Mack, in the Southern District of New York in a suit between the present parties involving the same charter party, *Atlantic Fruit Co.* v. *Red Cross Line*, 276 Fed., 319.

On June 4, 1920, the Atlantic Fruit Company (respondent herein) filed a libel in the United States District Court for the Southern District of New York, against the Red Cross Line (petitioner herein) for the recovery of $4,518.99, balance of charter hire on the Runa for the voyage in question.

The Red Cross Line appeared in the admiralty action and filed an answer pleading the payment

of $35,256.96 under protest. It also set up in Paragraph Seventeenth of its answer a separate defense to the effect that it had made a demand on the Atlantic Fruit Company for arbitration pursuant to the New York Statute and that the Atlantic Fruit Company had refused to arbitrate. The Atlantic Fruit Company excepted to this defense as insufficient. At the same time the Red Cross Line made a motion for a stay of the admiralty action pending the determination of the arbitration proceedings. Both motions were heard by Judge Mack at the same time.

Judge Mack denied the motion of the Red Cross Line for a stay and sustained the exceptions of Atlantic Fruit Company to the defense based upon the Arbitration Statute, and stated at page 324:

> "If now the admiralty courts sitting in the state of New York were for that reason to regard the New York Arbitration Statute as binding upon them, the result would be that a libel for breach of a maritime contract would be barred in those admiralty courts, and not barred in the admiralty courts sitting in other states, a clear impairment of uniformity."

Submitting the New York Arbitration Law to the test laid down in the authorities cited, it is clear that if allowed to operate in matters of maritime cognizance, it would not only divest the Courts of the United States of their constitutional jurisdiction, but would result in a gross impairment of the uniformity of the maritime law.

When a party to an arbitration agreement initiates proceedings in the New York Supreme Court

under the Arbitration Law to compel the other party to arbitrate, he starts something which does not end until the issue has been finally and completely settled. And the matter can be disposed of without the necessity of recourse to any other court.

As already explained, the Supreme Court directs the party in default to arbitrate and to appoint his arbitrator, and by virtue of the incorporation of sections 2365 to 2382 of the New York Code of Civil Procedure (now sections 1448 to 1469 of the New York Civil Practice Act) into the Arbitration Law, the award of the arbitrators is confirmed by the Court, a judgment is entered thereon as upon a referee's report in an action, the judgment is docketed, execution may issue, and an appeal may be taken just as in any other action.

What would finally become of the admiralty law of the United States if the act under consideration were held to be a proper subject of State legislation as regards maritime controversies. Consider what the results would be. In the present case we would have such questions as to whether or not the master prosecuted the voyage with the utmost despatch, whether the vessel was off hire under the "break-down" clause in the charter, whether she encountered a peril of the sea or whether or not the deviation to the Azores was justified, submitted to the decision of arbitrators who might, but more probably would not, be versed in the maritime law. Certainly they would not be bound to follow any precedents and in most cases would probably not be lawyers at all and their award could only be set aside upon proof of fraud or of some other irregularity.

Furthermore, if the State of New York should be held entitled to force parties to submit their maritime disputes to the decision of arbitrators, pursuant to an arbitration agreement, what is there to prevent other States from providing some analagous remedy? The result can well be imagined.

We are confident that this Court, should it feel disposed to review the decision of the Court of Appeals on this point, will agree that the Act, if applied to maritime matters, would create untold confusion.

Reply to Petitioner's Argument.

The contentions of the petitioner may be summarized broadly in the following order:

1. That the Arbitration Law did not create a new remedy but merely made *available* the old remedy of specific performance.

2. That the proceeding initiated by the petitioner is not one to adjust the dispute between the parties as to whether or not the petitioner is entitled to reimbursement for alleged overpaid charter hire and disbursements but is merely a proceeding to enforce the arbitration agreement in the charter party; that arbitration and not a maritime dispute is the subject of the agreement.

3. That the arbitration agreement is not a maritime covenant; that a charter party is a bundle of covenants, maritime and non-maritime, and that the arbitration agreement falls within the latter group.

4. That the saving clause of the Judicial Code saved to suitors all remedies which might thereafter be provided by the States as long as they were not purely admiralty remedies.

5. That the Arbitration Law, in making available the alleged remedy of specific performance for arbitration clauses in maritime contracts, has entered a field where the admiralty courts cannot function because of their want of power to direct the specific performance of contracts, in line with the decision in *Steamboat Co.* v. *Chase*, 16 Wall., 522.

6. That, assuming that the issue in hand is the controversy over the repayment of the charter hire and the reimbursement of certain disbursements to the petitioner, this proceeding is nothing more or less than an ordinary suit for damages at common law, reinforced by the auxiliary process of compulsory arbitration, and is hence based upon a common law remedy within the saving clause.

We shall answer the above named points in the order given.

1. The petitioner has elaborately argued that the Arbitration Law has not created a new remedy but simply made available the old common-law remedy of specific performance. On the contrary there never was, before the passage of the Arbitration Law, any remedy for the specific performance of an arbitration agreement. The fact that the statute was passed is the best answer to such an argument.

An arbitration agreement such as the present one was never an enforceable agreement.

Judge Hough in an exhaustive opinion in *United States Asphalt R. Co.* v. *Trinidad Lake P. Co.*, 222 Fed. Rep., 1006, has reviewed the history of arbitration, and in considering an arbitration clause in a charter party practically identical with that in the charter under consideration, summed up his conclusions as follows, at page 1010:

> "Finally, in *Guaranty, etc., Co.* v. *Green Cove, etc., R. R. Co.*, 139 U. S., at page 142, 11 Sup. Ct., at page 514, 35 L. Ed., 116, Brown, J., considered a proviso in a mortgage to the effect that a sale by the trustee should be 'exclusive of all other' methods of sale, and he laid down the law thus:
>
> > 'This clause * * * is open to the objection of attempting to provide against a remedy in the ordinary course of judicial proceedings, and oust the jurisdiction of the courts, which (as is settled by the *uniform current of authority*) cannot be done.' (Italics ours.)
>
> "The decision was filed in 1890. The latest opinion in this circuit known to me is *Gough* v. *Hamburg, etc., Co.* (D. C.), 158 Fed., 174, where Adams, J., lays down the rule without comment that any limitation upon the jurisdiction of courts contained in a contract is void."

Page 1012:

> "I think the decisions cited show beyond question that the Supreme Court has laid down the rule that such a complete ouster of juris-

diction as is shown by the clause quoted from the charter-parties is void in a Federal forum."

See also:

Insurance Co. v. *Morse*, 20 Wall., 457;
Doyle v. *Insurance Co.*, 94 U. S., 535;
Atlantic Fruit Co. v. *Red Cross Line*, 276 Fed., 319 and cases there cited.

The only recourse which a suitor would have had previous to the enactment of the Arbitration Law was a suit for damages for breach of contract. To say therefore that the statute has not created a new remedy is to blindly disregard a fact.

The Court of Appeals in its decision herein, disposed of this argument as follows (page 381 of its opinion):

"Counsel for the charterers urges that a remedy provided in the state court that makes available a remedy for the settlement of a maritime controversy through the specific performance of an agreement for that remedy is not an infringement of the jurisdiction of the Admiralty courts; that the charterers are not seeking a judgment for overpaid charter hire, etc., but an order decreeing that the arbitration proceed in the manner provided by the contract. Even if we assume that the proceeding is practically one to enforce specific performance of the arbitration clause of the contract, an order granting such relief presupposes the existence of a controversy the subject-matter of which is within the jurisdiction of the court granting the order. It would

be idle ceremony for the courts to grant an order requiring specific performance of an agreement to arbitrate a dispute, where upon an examination of the papers presented as the basis for such an order it is apparent that the subject-matter of the controversy which the "charterers" desire submitted to arbitration clearly arose under maritime clauses in a charter party over which the arbitrators could not assume jurisdiction even if arbitration was ordered."

At any rate, any argument by the petitioner as to whether the statute created or made available a remedy is foreclosed by the decision of the Court of Appeals, which this Court, in line with its previous decisions in *Quong Ham Wah Co.* v. *Industrial Accident Commission of the State of California, et al., and Ward & Gow* v. *Himan Krinsky and State Industrial Commission, supra,* will undoubtedly consider final and binding in this respect.

2. As to the nature of the dispute, the petitioner says that it is over arbitration and not over its right to the repayment of certain moneys.

The real object, however, which the petitioner had in view in beginning this proceeding was not to secure merely an order compelling the respondent to arbitrate, but was to have its right to reimbursement decided by arbitrators under the sanction of the Court.

It is impossible to separate into three distinct things the Arbitration Statute, the arbitration clause in the present charter and the real dispute

between the parties, in order to decide what really is the subject of the petitioner's remedy. Two things alone should be considered; first, the dispute over the payment of the petitioner's claim, and second, the Arbitration Statute and the arbitration clause, coupled together. The arbitration clause is not the subject of the petitioner's remedy at all, but, vitalized by the Statute, is the remedy itself. The Statute and the clause are inseparable.

Here again the decision of the Court of Appeals is binding, we submit, for it looks behind the naked arbitration agreement to the substantial dispute involved.

3. One of the petitioner's main points, if not its principal one, is that there is no dispute between the parties over which the admiralty courts have any jurisdiction. It is claimed that the arbitration agreement, even though found in a charter party, is not a maritime covenant.

In this connection, the arbitration clause should not be considered by itself dissociated from the charter party, for that clause is not really the subject of the petitioner's remedy. It *is* the petitioner's remedy, by virtue of the Statute.

If, however, the clause and not the real dispute is considered to be the subject of the remedy invoked, still the petitioner's argument falls, because an arbitration clause in a charter party is a subject of admiralty jurisdiction.

In *Munson* v. *Straits of Dover S. S. Co.*, 99 Fed., 787, a libel was filed in the admiralty court to recover damages for the respondent's breach of an agreement to arbitrate matters in dispute under a charter party. The dispute arose on a claim of

the owners of the steamship "Straits of Dover" for detention of the steamer beyond the charter period. The libellant offered to arbitrate the dispute but the ship owner refused and filed its libel in the Federal Court, which was subsequently dismissed. The respondent in the action brought on the breach of the arbitration agreement excepted to the libel and the Court sustained the exceptions on the ground that the subject of damages on the breach of an arbitration agreement was one too remote to be made the basis of an action. Nowhere in its opinion did the Court intimate that the arbitration agreement was not within the admiralty and maritime jurisdiction of the Court. It was stated as follows, at page 792:

> "While it may be possible that cases may arise in which there are damages that are the natural and proximate result of a refusal to refer to arbitration, I think that damages of the kind here sought to be recovered are not of that character."

This case was affirmed by the Circuit Court of Appeals for the Second Circuit in 102 Fed., 926, the Court holding that it was within the discretion of the lower Court to dismiss the suit where the party was entitled to nominal damages only.

Neither Judge Addison Brown nor the Circuit Court of Appeals apparently entertained any doubt that such an arbitration agreement was a maritime covenant. The question of the jurisdiction of the admiralty courts over a suit on an arbitration agreement in a charter party was argued in the briefs and it can be taken for granted

that if either the District or Circuit Court had considered that an admiralty court had no jurisdiction over a suit on such a covenant, some statement to that effect would have been made in the opinions.

The fact that the Court exercised its discretion in dismissing the libel because the damages were shown to be merely nominal, shows that the Court considered that it had jurisdiction of the contract. The Circuit Court of Appeals stated at page 928:

> "In admiralty, as in equity, it is in the discretion of the court to dismiss a suit, where the party is entitled to nominal damages only without costs, as was done in this case. Barnett v. Luther, 1 Curt., 434, Fed. Cas., No. 1,025; Merbst v. The Asiatic Prince (D. C.), 97 Fed., 343."

Moreover, in determining whether or not a contract is maritime, we must look to its subject matter rather than the mere agreement itself. The present arbitration agreement was made on land and would be performed on land, but nevertheless it refers to maritime disputes.

In *North Pacific Steamship Company* v. *Hall Brothers Marine Railway & Shipbuilding Company*, 249 U. S., 119, a libel in *personam* was filed against the steamship company to recover a balance claimed to be due for work, labor and services rendered and materials furnished in connection with the repairing of the steamer "Yucatan." The steamship company, after a decree had been entered in favor of the libellant, moved to vacate the decree and dismiss the cause for want of jurisdiction.

The "Yucatan" had been moored at the dock in Seattle, Washington, and needed extensive repairs. The libellant owned a shipyard, marine railway, etc., upon and near Puget Sound. It was agreed that the shipbuilding company should tow the vessel to the libellant's shipyard, haul her out upon dry land on a marine railway, and place her in the "dry dock" which was on land. The greater part of the repairs were made to the vessel while she was on land adjacent to the libellant's machine shop. It was contended by the respondent that the claim was not one of admiralty jurisdiction, because the service performed was not of a maritime nature. An appeal was taken direct to the Supreme Court from the order of the District Court for the Northern District of California, denying the respondent's motion. The order was affirmed and the Court held that the contract was a maritime one and stated at page 125:

> "It must be taken to be the settled law of this Court that while the civil jurisdiction of the admiralty in matters of tort depends upon locality—whether the act was committed upon navigable waters—*in matter of contract it depends upon the subject-matter—the nature and character of the contract; and that the English rule, which conceded jurisdiction, with a few exceptions, only to contracts made and to be executed upon the navigable waters, is inadmissible, the true criterion being the nature of the contract, as to whether it have reference to maritime service or maritime transaction.*" (Italics ours.)

It was also stated at page 125:

"In some of the earlier cases, the influence of the English rule may be discerned, in that the question whether a contract was to be performed upon the navigable waters was referred to as pertinent to the question whether the contract was of a maritime nature. (*The Thomas Jefferson*, 10 Wheat., 428, 429; *The Planter* [*Peyroux* v. *Howard*], 7 Pet., 324; 341; *Steamboat Orleans* v. *Phoebus*, 11 Pet., 175, 183; *New Jersey Steam Navigation Co.* v. *Merchants' Bank*, 6 How., 344, 392); but a careful examination of the opinions shows that the place of performance was dealt with as an evidential circumstance bearing with more or less weight upon the fundamental question of the nature of the contract. If they go beyond this, they must be deemed to be overruled by *Insurance Co.* v. *Dunham*, *supra*" (11 Wall., 1, 26).

The Court also stated at page 128 as follows:

"What we have said sufficiently indicates the decision that should be reached in the case at bar. The contract as made contemplated the performance of services and the furnishing of the necessary materials for the repairs of the steamship 'Yucatan.' It was an entire contract, intended to take the ship as she was and to discharge her only when completely repaired and fit for the Alaskan voyage. * * * In *The Planter* (*Peyroux* v. *Howard*), 7 Pet., 324, 327, 341, the vessel, requiring repairs below the water line, as well as above, was to be and in fact was hauled up out of the water; and it was held that the contract for materials

furnished and work performed in repairing her under these circumstances was a maritime contract. We think the same rule must be applied to the case before us; that the doubt intimated in *The Robert W. Parsons*, 191 U. S., 17, 33, 34, must be laid aside; and that there is no difference in character as to repairs made upon the hull of a vessel dependent upon whether they are made while she is afloat, while in dry dock, or while hauled up by ways upon land. The nature of the service is identical in the several cases, and the admiralty jurisdiction extends to all."

In *Baltimore Steam-Packet Company* v. *Paterson*, 106 Fed. Rep., 736, the Circuit Court of Appeals for the Fourth Circuit had under consideration a libel in personam filed for breach of an agreement to ship freight on a certain vessel. The document was in the form of a freight engagement, stating that 1,000 bales of cotton had been booked with the libellant from Baltimore to Liverpool.

The Court held that the agreement was essentially maritime in its nature and that the District Court had jurisdiction of the subject matter.

In *Graham* v. *Oregon R. & Navigation Co.*, 135 Fed., 608 (S. D. N. Y.), the libellant entered into an agreement with the respondent providing reciprocal obligations, namely, that the libellant should furnish certain vessels to carry cargoes furnished by the respondent, and also that the respondent would furnish the cargoes for such vessels. The respondent excepted to the libel on the ground that a maritime cause of action was not set forth. Judge Adams of the Southern District of

New York overruled the exceptions and stated as follows, at page 611:

> "The allegations of the new libel set forth a contract for the furnishing of cargoes on the respondent's part and of steamships on the libellant's part to carry the cargoes. Such a contract is essentially maritime within the authorities."

It should be noted that the respondent was a railroad and that the cargoes to be furnished under the contract obviously came from inland points.

Furthermore, at the time when the petitioner demanded arbitration of the respondent and filed its petition, *the matters in dispute*, to settle which the petitioner called for arbitration, were obviously maritime and such as the admiralty courts are considering daily.

Under the cited cases therefore the matter to which the arbitration clause relates being maritime, it follows that the agreement is maritime and hence within the admiralty and maritime jurisdiction, except where a common-law remedy is saved.

The petitioner cites on page 15 of its brief the case of *The Ada*, 250 Fed., 194 (C. C. A., Second Circuit), where the Court had under consideration a charter party which contained covenants to purchase the captain's chronometer and the steamer's ice box. Of course these covenants could not be maritime in any respect because their subject matter was not maritime. They differ greatly, however, from a covenant to arbitrate disputes arising out of the charter party, particularly where maritime disputes to which the clause relates have arisen.

The petitioner also cites on page 23 of its brief the case of *Pacific Surety Company* v. *Leatham & Smith Towing & Wrecking Co.*, 151 Fed., 440, where the Court held that a bond securing the performance of a charter party was not a maritime obligation. It was held, of course, that the charter party was a maritime contract, but the admiralty court refused to take jurisdiction because the respondent executing the bond was not a party to the original maritime contract, and stated as follows, at page 441:

> "The appellant, however, as surety on the bond was no party to the maritime undertaking; neither promised performance of the charter service, nor was authorized under the contract terms to perform. Chamberlain was the sole contractor under the charter, which was neither assignable in terms, nor subject to performance of the obligations by another. The charter use and service were coupled with liabilities which made them personal and not open to performance by the appellant, if it so desired."

The distinction between the foregoing case and the present one is obvious. Here both parties to the maritime contract are before the Court and the covenant sought to be enforced is a component part of the agreement.

The case of *Haller* v. *Fox*, 51 Fed., 289, is opposed to *Pacific Surety Company* v. *Leatham & Smith Towing and Wrecking Co., supra,* Judge Hanford, in the *Haller* case, holding that a bond for the performance of a charter party is a mari-

time contract and within the admiralty jurisdiction.

The petitioner on page 12 of its brief lays down as an essential requisite of a contract to render it maritime, that it be an undertaking for the performance of maritime services or transactions. This definition is doubtless good in part, but is neither accurate nor broad enough to include all contracts which are within the admiralty jurisdiction. For example, a policy of marine insurance on the hull of a vessel is obviously a maritime contract and yet it is not an undertaking for the performance of maritime services. It is merely an agreement to indemnify the ship-owner for damage to or loss of the vessel. The subject of the contract being the ship, however, the agreement is maritime.

It is of course conceded that a charter party may contain non-maritime covenants and that actions solely for the breach of those covenants could not be maintained in an admiralty court simply because the covenants were contained in a contract otherwise maritime. A case of this type is *Richard* v. *Holman*, 123 Fed. Rep., 734, cited at page 13 of the petitioner's brief. This doctrine, however, is limited to such covenants as are distinct and separate in themselves and unrelated to the maritime provisions of the agreement. The arbitration covenant on the other hand is so inseparably connected with the other covenants of the charter which the petitioner concedes are maritime, that it cannot be considered apart from those provisions and as having a different and non-maritime character.

The petitioner contends that the rule laid down by the courts is that a contract consisting of inseparable covenants must be entirely maritime in

its nature to sustain a suit in admiralty. This is not the correct rule. In *The Ada, supra*, Judge Hough states as follows his reasons for concurring with the opinion of Judge Ward, who wrote the main opinion:

> "The rule that a contract, to be maritime, and therefore within admiralty jurisdiction, must be 'wholly maritime,' means that the principal subject-matter of agreement gives character to the whole. This construction of the phrase was adopted by this Court in The Pennsylvania, 154 Fed., 9, 83 C. C. A., 139. Applying it to this case, I doubt whether the contract made had any of the marks of a charter except it was an agreement to sell; the right to use pending payment was an incidental matter."

Judge Rogers, concurring also in the decision, stated as follows:

> "The contract involved is plainly a contract of sale. For a contract to fall within the admiralty jurisdiction, it must concern transportation by sea, relate to navigation or maritime employment, or be one of navigation and commerce of navigable waters. And the contract here does not come under any of these heads."

Judge Ward also stated at page 196:

> "All the provisions of the agreement show that the main intention was a contract of sale."

The true basis of determination therefore is whether the main object or "principal subject-mat-

ter" of the contract is maritime in its nature and not whether the contract is exclusively maritime. In the case at bar, obviously, the main object of the contract is maritime, and the only disputes which might arise thereunder are maritime.

The cases of *Western Fuel Company* v. *Garcia, Administrator of Souza*, 257 U. S., 233; *Grant Smith-Porter Co.* v. *Rohde*, 257 U. S., 469, and *State Industrial Commission of the State of New York* v. *Nordenholt Corporation, et al.*, 259 U. S., 263, cited by the petitioner, in no way change or modify the rule laid down in the authorities previously cited.

The case of *Western Fuel Company* v. *Garcia, Administrator of Souza, supra*, cited *American Steamboat Co.* v. *Chase, supra*, and quite properly held that as long as the admiralty courts had never entertained suits under the general maritime law to recover damages for the death of a human being, it was not improper for a state to pass an act allowing a recovery in such an event, and that the admiralty courts could take jurisdiction of such a case.

The case of *Grant Smith-Porter Co.* v. *Rohde, supra*, proceeded upon the assumption that a carpenter who was working on a bulkhead enclosing tanks in a vessel which, although launched and lying in navigable waters, was incompleted and not yet in commission, was engaged in the performance of a non-maritime contract and hence the Workmen's Compensation Act of Oregon applied because neither the employee nor the employer had specifically rejected its provisions, as required.

In *State Industrial Commission, etc.* v. *Nordenholt Corporation, et al., supra*, this Court held that a longshoreman who was injured on a dock, an extension of the land, while engaged in the unload-

ing of a vessel lying in navigable waters, was not engaged in a maritime service and hence came within the provisions of the New York Workmen's Compensation Act.

4. The petitioner further argues that what the saving clause of the Judicial Code preserved to suitors was a common law remedy as distinguished from an admiralty remedy, implying that as long as the States do not create remedies which partake of the characteristics of remedies in admiralty such as proceedings in *rem*, they can pass any legislation that they see fit concerning maritime matters. This of course is not so. Not only cannot a State enact a law providing a remedy of a peculiarly admiralty nature against a ship in *rem*, but it cannot pass any law affecting matters of a maritime nature which impairs or tends to impair the essential uniformity of the maritime law in the United States.

That the rule is not confined to the class of legislation referred to by the petitioner is shown by the decisions in *Southern Pacific Co.* v. *Jensen*, and *Knickerbocker Ice Co.* v. *Stewart*, *supra*, where the constitutionality of the Workmen's Compensation Act of New York, in its application to maritime matters, and the amendment to the Judicial Code authorizing the States to pass Workmen's Compensation legislation, were considered.

In *Union Fish Company* v. *Erickson*, *Chelentis* v. *Luckenbach*, *Watts* v. *Camors, and Workman* v. *City of New York*, *supra*, no questions as to the validity of remedies in *rem* provided by State laws were involved, and yet it was held in all of those

cases that State laws and decisions had no effect where maritime matters were concerned.

5. The petitioner also makes the peculiar argument by some assumed analogy to the case of *Steamboat Co.* v. *Chase*, *supra*, that the Arbitration Law has made available a remedy, that of specific performance, which an admiralty court is powerless to grant to a suitor, and that therefore the state court has jurisdiction of such a remedy.

In *Steamboat Co.* v. *Chase*, *supra*, the suit was under a statute of a State giving an action for damages for the loss of life resulting from a collision on navigable waters. It was held by the Supreme Court, that inasmuch as there was no remedy in the admiralty courts at that time for such an injury, the State courts were at liberty to exercise jurisdiction in actions not cognizable in the admiralty courts just as if such courts were unknown to the Constitution. The same rule cannot be applied in the case of a claim connected with a charter party because the admiralty courts have always taken jurisdiction of suits involving such agreements.

6. The petitioner argues on pages 8, 9, 31, 32, 41-43 of its brief, that after all, the remedy relied upon is an ordinary common law remedy, because the proceeding is simply a common law suit for damages in the State court with the compulsory arbitration feature added. This argument flies directly in the face of the decision by the Court of Appeals herein that the section of the Arbitration Law under which the petitioner's order was granted is a *statutory legal remedy of a character unknown to the common law*, which construction this Court, following its previous decisions, will unquestionably consider itself bound to follow.

Petitioner's Assignments of Error.

On page 9 of its brief, the petitioner sets forth the errors which it assigns on the part of the New York Court of Appeals.

The first assignment charges that the State court erred in holding that to enforce the arbitration agreement in the State court would deny to the federal courts their exclusive constitutional jurisdiction.

The second assignment alleges that the Court erred in holding that the subject of the dispute is within the exclusive jurisdiction of the admiralty courts because it pertains to navigation.

The third assignment alleges error by the Court of Appeals in holding that the enforcement of the arbitration agreement in the State court would "destroy a rule of uniformity."

The first two assignments disclose either an entire misapprehension or a misconstruction of the decision of the New York Court of Appeals on the part of the petitioner. The petitioner for instance, on pages 33 and 34 of its brief picks out an extract from the opinion of the Court of Appeals stating that the question of liability is within the exclusive jurisdiction of the courts of admiralty, and argues therefrom that the Court of Appeals has not grasped the question.

It is elementary that, in order to ascertain what a Court has decided, its entire opinion must be looked at, as the petitioner itself well said in its brief in the Court of Appeals, from which we quote verbatim; "The appellant cannot use an isolated excerpt of the opinion to prove its contention. We must look at the whole opinion in order to construe any part thereof * * *."

That the Court of Appeals was well aware of the precise question involved is shown by the very first lines of its opinion (page 379), where it refers to the Judicial Code, and specifically mentions the clause saving common law remedies to suitors. It is therefore not correct to say that the Court of Appeals decided that the admiralty courts had absolute jurisdiction over all maritime matters. What it did say was that the admiralty courts have exclusive jurisdiction over maritime disputes, except as common law remedies may have been saved to suitors, and it held that because the Arbitration Statute did create a new remedy unknown to the common law it was not intended to apply to maritime disputes.

The Court of Appeals was not misled by the specious argument that *arbitration* was the only matter in issue, but it looked through to the real issue, which is purely maritime, and rightly decided that the Statute did not apply.

The petitioner draws the conclusion on page 16 from the following quotation from the opinion of the State Court (page 382): "Even if we assume that the proceeding is practically one to enforce specific performance of the arbitration clause of the contract, an order granting such relief presupposes the existence of a controversy the subject-matter of which is within the jurisdiction of the Court granting the order.", that the Court assumed that the petitioner was not seeking a judgment for the return of alleged overpaid charter hire. We submit that such an inference is absolutely unwarranted. What the Court obviously meant was that even granting the petitioner's argument, it would not lend its hand to do indirectly something which it otherwise had no power to do.

We have already answered the third assignment fully and need say no more in reference thereto.

POINT II.

The judgment of the Supreme Court of the State of New York, New York County, entered upon the judgment and remittitur of the Court of Appeals of New York should be affirmed.

Dated, New York, October 17, 1923.

Respectfully submitted,

HUNT, HILL & BETTS,
Attorneys for Atlantic Fruit Company.

JOHN W. CRANDALL,
Counsel.

JOHN W. CRANDALL,
EDNA RAPALLO,
On the Brief.

RED CROSS LINE *v.* ATLANTIC FRUIT COMPANY.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 112. Argued November 14, 15, 1923.—Decided February 18, 1924.

1. A decision of the highest court of a State excluding maritime contracts from the operation of a state statute, not as a matter of statutory construction but due to its opinion that the Federal Constitution so requires, presents a constitutional question reviewable here. P. 120.
2. Under the provision of the Judicial Code (§ 24, par. 3) vesting the District Courts with exclusive jurisdiction of all civil causes of admiralty and maritime jurisdiction but saving to suitors the right of a common law remedy, a State may confer upon its courts jurisdiction to specifically perform an agreement for arbitration valid by the general maritime law and by the law of the State, which is contained in a charter-party made in the State and which, by its terms, is to be performed there. P. 122.

233 N. Y. 373, reversed.

CERTIORARI to a judgment of the Supreme Court of New York entered on a judgment of the New York Court of Appeals reversing a judgment of the Appellate Division of the Supreme Court, which had affirmed an order of the Supreme Court, in New York County, by which the present respondent was directed to proceed to arbitration under its contract contained in a charter-party, executed in New York, whereby a vessel was chartered to the petitioner by the respondent.

Mr. Homer L. Loomis, with whom *Mr. Reginald B. Williams* was on the briefs, for petitioner.

The agreement to arbitrate alone is the subject of the statute, which prescribes the procedure, *Berkovitz* v. *Arbib & Houlberg, Inc.*, 230 N. Y. 261, and is intended to compel specific performance of such agreements. *Matter of Division 132*, 196 App. Div. 206.

The courts have never denied that an agreement to arbitrate creates a right, though public policy was thought to forbid specific performance. *Hamilton* v. *Home Ins. Co.*, 137 U. S. 370.

The application of the statutory remedy to the independent contract to arbitrate incorporated in a charter-party does not infringe the jurisdiction of the admiralty court; at least not unless this independent contract is maritime and subject to the admiralty jurisdiction.

The agreement to arbitrate is not a maritime agreement and is not within the jurisdiction of the admiralty court. The essential requisite of a contract to bring it within the admiralty jurisdiction and the true criterion for its determination is an undertaking for the performance of maritime services. *North Pacific S. S. Co.* v. *Hall Bros. Co.*, 249 U. S. 119; *People's Ferry Co.* v. *Beers*, 20 How. 393; *New Jersey Nav. Co.* v. *Merchants Bank*, 6 How. 344; *The Perseverance*, Blatchf. & H. 385; *Pacific Surety Co.* v. *Leatham Co.*, 151 Fed. 440; 1 Am. & Eng. Encyc. Law, 660.

The fact that the arbitration agreement is included in a charter-party does not alter the nature of the act or acts agreed to be done. A charter-party, while it is characterized generally as a maritime contract, is to speak more accurately a series of agreements, some of which very often have no relation to a maritime service and are unenforceable in an admiralty court. The agreement to arbitrate is obviously entirely independent of and unrelated to the other covenants in the charter-party. *Brown* v. *West Hartlepool Nav. Co.*, 112 Fed. 1018; *Richard* v. *Holman*, 123 Fed. 734; *Richard* v. *Hogarth*, 94 Fed. 684; *Taylor* v. *Weir*, 110 Fed. 1005; *The Thames*, 10 Fed. 848; *Plummer* v. *Webb*, 4 Mason, 380; *Grant* v. *Poillon*, 20 How. 162; *The Ada*, 250 Fed. 194; *Pacific Surety Co.* v. *Leatham Co.*, 151 Fed. 440.

On any hypothesis, no reason exists for holding an agreement to arbitrate to be maritime. Its enforcement

no more calls for the application of any maritime principle than would a controversy as to fraud or mistake in its inception, where only the common law courts (as distinguished from the admiralty courts) could assume jurisdiction of the controversy or grant any relief in reference thereto.

If the subject matter of the agreement to arbitrate is the subject matter of the various and varying controversies that may thereafter arise by reason of the asserted breach of other covenants of the principal contract, the measure of damages for the breach of the arbitration agreement in an action at law would not be the loss resulting from the breach of that agreement, but rather the loss suffered by reason of the alleged breach of the other covenants of the contract; an obvious absurdity. *Munson* v. *Straits of Dover S. S. Co.*, 99 Fed. 787, distinguished.

But even if the agreement to arbitrate should be considered maritime, the equity court has jurisdiction to compel its specific performance. *The Eclipse*, 135 U. S. 599; *Andrews* v. *Essex Ins. Co.*, 3 Mason, 6; *Meyer* v. *Pacific Mail S. S. Co.*, 58 Fed. 923; *Dean* v. *Bates*, 2 Woodb. & M. 87; *Kynock* v. *Ives*, Newb. 205; *Steamboat Co.* v. *Chase*, 16 Wall. 522.

Settlement of maritime controversies by arbitration is not inhibited by the provision conferring jurisdiction of maritime causes on admiralty courts. Congress in its exception did not save to suitors a remedy in the common law courts but a common law remedy. *Berry* v. *Donovan & Sons*, 120 Me. 457. Arbitration, while not an action, was nevertheless a well known remedy at common law for the settlement of controversies. Admiralty courts, like the common law courts, have always considered as valid, and upheld, the awards made in such controversies. *Toledo S. S. Co.* v. *Zenith Transp. Co.*, 184 Fed. 391.

Whether a court intervenes to decree the specific performance of the agreement or it is carried out without its intervention, the jurisdiction of the arbitrators, that is the power to hear and determine, results from the agreement of the parties, not from the mandate of the court, and hence it would seem that their jurisdiction is as valid in the one case as in the other.

The state court in enforcing an agreement does not deny to the admiralty court its exclusive jurisdiction merely because by reason of such enforcement a forum other than the admiralty may determine the event and measure of damages for the breach of a maritime contract. *Pacific Surety Co.* v. *Leatham Co.*, 151 Fed. 440.

That a party by contract may waive not only his rights under the maritime law, but also the right to resort to the admiralty court for the adjustment of his disputes, seems to be the effect of *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U. S. 469. It is not the policy of the law to compel parties to litigate disputes, maritime or otherwise. *West* v. *Kozer*, 104 Ore. 94

The so-called public policy rule against specific performance of such contracts should not be extended. The supposed policy itself is one of the common law; not of the admiralty. It has been followed in the admiralty, as in the state courts, in deference to early precedent, although with frequent protest. *United States Asphalt Co.* v. *Trinidad Lake Co.*, 222 Fed. 1006; *Atlantic Fruit Co.* v. *Red Cross Line*, 276 Fed. 319; *Berkovitz* v. *Arbib & Houlberg, Inc.*, 230 N. Y. 276. It has now been repudiated and abandoned by the courts of England in which it originated. *Atlantic Shipping Co.* v. *Dreyfus & Co.*, 10 Lloyd's List Law Rep. 707; *Aktieselskabet, Korn-Og, etc.* v. *Rederiaktiebolaget Atlanten*, 250 Fed. 935.

Even if the ultimate controversies between the parties are the subject of the state remedy, the state remedy is the

equivalent of a common law remedy and is one that is saved to suitors. The clause saving a common law remedy has always been held to confer concurrent jurisdiction on the state courts to furnish a common law remedy in civil cases of maritime origin even if the jurisdiction had not existed before. *New Jersey Nav. Co.* v. *Merchants Bank*, 6 How. 344; *Propeller Genesee Chief*, 12 How. 443; *The Belfast*, 7 Wall. 624; *Leon* v. *Galceran*, 11 Wall. 185; *Schoonmaker* v. *Gilmore*, 102 U. S. 118; *Insurance Co.* v. *Dunham*, 11 Wall. 1; *Manchester* v. *Massachusetts*, 139 U. S. 262.

[Counsel reviewed the following cases interpreting the saving clause. *The Moses Taylor*, 4 Wall. 411; *The Hine* v. *Trevor*, 4 Wall. 555; *The Belfast*, 7 Wall. 624; *The Lottawanna*, 21 Wall. 558; *The J. E. Rumbell*, 148 U. S. 1; *The Glide*, 167 U. S. 606; *Knapp, Stout & Co.* v. *McCaffrey*, 177 U. S. 638; *Leon* v. *Galceran*, 11 Wall. 185; *Rounds* v. *Cloverport Foundry Co.*, 237 U. S. 303; *Johnson* v. *Westerfield*, 143 Ky. 10; *Chase* v. *Steamboat Co.*, 9 R. I. 419; affd. 16 Wall. 522; *The Kalfarli*, 277 Fed. 391. Distinguishing: *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205; *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149; *Union Fish Co.* v. *Erickson*, 248 U. S. 308; *Watts* v. *Camors*, 115 U. S. 353. See *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U. S. 469.]

The uniformity rule is directed toward statutes changing rights and liabilities definitely fixed by maritime rules. *Jensen and Stewart Cases, supra; Industrial Commission* v. *Nordenholt Corporation*, 259 U. S. 263; *Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372.

The arbitration statute neither changes nor impairs the rights and obligations fixed by maritime rules.

Remedies are regulated by the *lex fori*. *Knapp, Stout & Co.* v. *McCaffrey*, 177 U. S. 638; *Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372.

Mr. John W. Crandall, with whom *Edna Rapallo* was on the brief, for respondent.

The dispute between the parties herein arose out of a maritime contract and hence is within the exclusive jurisdiction of the admiralty courts, except as a common law remedy may have been saved to the petitioner. The New York Arbitration Law has provided a new remedy, unknown to the common law, for the adjustment of controversies.

A charter-party is a maritime contract, and accordingly within the exclusive admiralty and maritime jurisdiction of the federal courts, except for the saving clause of the Judicial Code. *Morewood* v. *Enequist*, 23 How. 491; *Metropolitan S. S. Co.* v. *Pacific Alaska Nav. Co.*, 260 Fed. 973; *Dunbar* v. *Weston*, 93 Fed. 472.

The saving clause refers on its face to remedies, and this has been construed to mean common law remedies and not remedies in common law courts. *The Moses Taylor*, 4 Wall. 411; *Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372. This Court has held that the New York Workmen's Compensation Act provided a remedy and was unconstitutional in so far as such remedy was designed to cover matters of a maritime nature. *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205; *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149. In the present case, petitioner relies upon the new remedy given by the Arbitration Law. *Berkovitz* v. *Arbib & Houlberg, Inc.*, 230 N. Y. 261; *Red Cross Line* v. *Atlantic Fruit Co.*, 233 N. Y. 373.

It is highly questionable whether there is anything for this Court to review, inasmuch as the Court of Appeals, by holding that the Arbitration Law was not intended to apply to maritime controversies, has left nothing of a federal nature for this Court to consider. The Court of Appeals has not passed upon the constitutionality of the law. If it erred in deciding that the dispute is maritime, the petitioner has in no way been deprived of any right under the Federal Constitution and laws.

The agreement to arbitrate is part of a maritime contract, and is void in the federal forum. To sustain and enforce it, the state courts would deny to the federal court the exclusive jurisdiction with which Congress has clothed it, and likewise destroy a rule of uniformity.

The admiralty and maritime jurisdiction covers not merely the cognizance of the case, but the jurisdiction and principles by which it is to be administered. A State has no right to step in and fill up by its own legislation what is not actually occupied by that of Congress. *The Chusan,* 5 Fed. Cas. No. 2717. It could not have been the intention of Congress, by the exception, to give the suitor all such remedies as might afterwards be enacted by state statutes, for this would have enabled the States to make the jurisdiction of their courts concurrent in all cases. *The Hine* v. *Trevor,* 4 Wall. 555; *Brookman* v. *Hamill,* 43 N. Y. 554; *The Lottawanna,* 21 Wall. 558; *The J. E. Rumbell,* 148 U. S. 1.

Not only have the States no power to enact laws giving to suitors an admiralty remedy such as a suit *in rem,* but they have no authority to pass any law regulating or affecting maritime matters which may tend to impair that uniformity which is so essential to the application of the maritime law through all of the States. *Union Fish Co.* v. *Erickson,* 248 U. S. 308; *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205; *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149; *Chelentis* v. *Luckenbach S. S. Co.,* 247 U. S. 372; *Watts* v. *Camors,* 115 U. S. 353; *Workman* v. *New York City,* 179 U. S. 552; *The Thielbek,* 241 Fed. 209; *Rodgers & Hagerty, Inc.* v. *New York City,* 285 Fed. 362; *Atlantic Fruit Co.* v. *Red Cross Line,* 276 Fed. 319.

When a party to an arbitration agreement initiates proceedings in the New York Supreme Court under the Arbitration Law to compel the other party to arbitrate, he starts something which does not end until the issue has been finally and completely settled. And the matter can

be disposed of without the necessity of recourse to any other court.

What would finally become of the admiralty law of the United States if the act under consideration were held to be a proper subject of state legislation as regards maritime controversies? In the present case we should have such questions as to whether or not the master prosecuted the voyage with the utmost despatch, whether the vessel was off hire under the "break-down" clause in the charter, whether she encountered a peril of the sea, or whether or not the deviation to the Azores was justified, submitted to the decision of arbitrators who probably would not be versed in the maritime law. Certainly they would not be bound to follow any precedents, and in most cases would probably not be lawyers, and their award could only be set aside upon proof of fraud or of some other irregularity.

The petitioner argues that the Arbitration Law has not created a new remedy, but simply made available the old common law remedy of specific performance. An arbitration agreement such as the present one was never an enforceable agreement. *United States Asphalt Co.* v. *Trinidad Lake Co.*, 222 Fed. 1006; *Insurance Co.* v. *Morse*, 20 Wall. 45; *Doyle* v. *Insurance Co.*, 94 U. S. 535; *Atlantic Fruit Co.* v. *Red Cross Line*, 276 Fed. 319. The only recourse which a suitor would have had previous to the enactment of the Arbitration Law was a suit for damages for breach of contract. Any argument as to whether the statute created or made available a remedy is foreclosed by the decision of the Court of Appeals in this case.

The petitioner says the dispute is over arbitration, and not over its right to the repayment of certain moneys. The real object, however, was to have the right to reimbursement decided by arbitrators under the sanction of the court. An arbitration clause in a charter-party is a

subject of admiralty jurisdiction. *Munson* v. *Straits of Dover S. S. Co.*, 99 Fed. 787.

In determining whether or not a contract is maritime, we must look to its subject matter. This one was made on land and would be performed on land, but nevertheless refers to maritime disputes. *North Pacific S. S. Co.* v. *Hall Bros. Co.*, 249 U. S. 119; *Baltimore Co.* v. *Paterson*, 106 Fed. 736; *Graham* v. *Oregon Co.*, 135 Fed. 608.

Furthermore, when petitioner demanded arbitration and filed its petition, the matters in dispute were obviously maritime and such as the admiralty courts are considering daily. It follows that the agreement is maritime and hence within the admiralty jurisdiction, except where a common law remedy is saved. *The Ada*, 250 Fed. 194, and *Pacific Surety Co.* v. *Leatham Co.*, 151 Fed. 440, distinguished. Cf. *Haller* v. *Fox*, 51 Fed. 289.

It is of course conceded that actions solely for the breach of non-maritime covenants could not be maintained in an admiralty court simply because they were contained in a contract otherwise maritime. *Richard* v. *Holman*, 123 Fed. 734. This doctrine, however, is limited to such covenants as are distinct and separate in themselves, and unrelated to the maritime provisions of the agreement.

The cases of *Western Fuel Co.* v. *Garcia*, 257 U. S. 233; *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U. S. 469; and *Industrial Commission* v. *Nordenholt Corporation*, 259 U. S. 263; in no way change or modify the rule laid down in the authorities previously cited.

Not only cannot a State enact a law providing a remedy of a peculiarly admiralty nature against a ship *in rem*, but it cannot pass any law affecting matters of a maritime nature which impairs or tends to impair the essential uniformity of the maritime law in the United States.

The rule applied in *Steamboat Co.* v. *Chase*, *supra*, where there was no remedy in the admiralty courts at

that time for the injury involved, cannot be applied in the case of a claim connected with a charter-party, because the admiralty courts have always taken jurisdiction of suits involving such agreements.

The argument that only a common law remedy is sought flies directly in the face of the decision by the court below that the law gives a statutory legal remedy of a character unknown to the common law.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The Arbitration Law of New York, enacted April 19, 1920, c. 275, and amended March 1, 1921, c. 14, declares that a provision in a written contract to settle by arbitration a controversy thereafter arising between the parties "shall be valid, enforcible and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract." It authorizes the Supreme Court, or a judge thereof, to direct, upon the application of a party to such an agreement, that the arbitration proceed in the manner so provided; to appoint an arbitrator for the other party, in case he fails to avail himself of the method prescribed by the contract; and to stay trial of the action, if suit has been begun. The law applies to contracts made before its enactment, if the controversy arose thereafter. *Matter of Berkovitz* v. *Arbib & Houlberg*, 230 N. Y. 261, 270, 271. Prior to this statute an agreement to arbitrate was legal in New York and damages were recoverable for a breach thereof. *Haggart* v. *Morgan*, 5 N. Y. 422, 427. But specific performance of the promise would not be enforced; the promise could not be pleaded in bar of an action; and it would not support a motion to stay. *Finucane Co.* v. *Board of Education*, 190 N. Y. 76, 83. These limitations upon the enforcement of a promise to arbitrate had been held to be part of the law of remedies. *Meacham* v. *James-*

town, etc. R. R. Co., 211 N. Y. 346, 352. The purpose of the statute was to make specific performance compellable. 230 N. Y. 261, 269. Whether agreements for arbitration of disputes arising under maritime contracts are within the scope of the statute, and whether, if so construed and applied, the state law conflicts with the Federal Constitution, are the questions for decision.

Proceeding under the Arbitration Law, the Red Cross Line applied to the Supreme Court of the State, on April 12, 1921, for an order directing the Atlantic Fruit Company to join with it in the arbitration of a dispute arising out of the charter of the steamship Runa. The substantive claim was that the master had not prosecuted the voyage with the utmost dispatch and, hence, that certain amounts paid by the charterer should be returned. The charter party, which had been executed in New York on November 28, 1919, contained the following provision:

"That should any dispute arise between Owners and Charterers, the matters in dispute shall be referred to three persons in New York; one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision, or that of any two of them, shall be final and for the purpose of enforcing any award, this agreement may be made a rule of Court. . . ."

Before instituting this proceeding the Red Cross Line had duly appointed its arbitrator; but the Atlantic Fruit Company had refused to appoint the one to be named by it. The court ordered the latter company to proceed to arbitration as provided in the contract, and to appoint its arbitrator by a day fixed. This order was affirmed by the Appellate Division without opinion. Its judgment was reversed by the Court of Appeals, which stated that the controversy between the parties is one of admiralty; that under Article III, § 2, of the Federal Constitution, and § 256, Clause Third, of the Judicial Code,

such controversies are within the exclusive jurisdiction of the admiralty courts; and that the State had no power to compel the charter owner to proceed to arbitration. *Matter of Red Cross Line* v. *Atlantic Fruit Co.*, 233 N. Y. 373. The case is here on writ of certiorari under § 237 of the Judicial Code, as amended. 260 U. S. 716.

Respondent contends that the petition should be dismissed for lack of a federal question. The argument is that the Court of Appeals held, as a matter of statutory construction, that the Arbitration Law does not extend to controversies which are within the admiralty jurisdiction; and that the substantive claim sought to be enforced is so cognizable. The claim to recover an amount paid under a charter party as charter hire is within the admiralty jurisdiction. *Morewood* v. *Enequist*, 23 How. 491. If that court had construed the Arbitration Law as excluding from its scope controversies which are within the admiralty jurisdiction, the construction given to the state statute would bind us; and there would be no occasion to consider the constitutional question presented. *Quong Ham Wah Co.* v. *Industrial Accident Commission*, 255 U. S. 445; *Ward & Gow* v. *Krinsky*, 259 U. S. 503, 510. An expression used by the Court of Appeals lends some color to respondent's contention, 233 N. Y. 373, 381. But a reading of the whole opinion shows that the state court excluded maritime contracts from the operation of the law, not as a matter of statutory construction, but because it thought the Federal Constitution required such action. Compare *State Industrial Commission* v. *Nordenholt Corporation*, 259 U. S. 263. We proceed, therefore, to the consideration of the constitutional question.

The federal courts—like those of the States and of England—have, both in equity and at law, denied, in large measure, the aid of their processes to those seeking to en-

force executory agreements to arbitrate disputes. They have declined to compel specific performance, *Tobey* v. *County of Bristol*, 3 Story, 800, 819–826;[1] or to stay proceedings on the original cause of action. Story, Equity Jurisprudence, § 670. They have not given effect to the executory agreement as a plea in bar; except in those cases where the agreement, leaving the general question of liability to judicial decision, confines the arbitration to determining the amount payable or to furnishing essential evidence of specific facts, and makes it a condition precedent to the cause of action. *Hamilton* v. *Liverpool, London & Globe Insurance Co.*, 136 U. S. 242, 255; *Martinsburg & Potomac R. R. Co.* v. *March*, 114 U. S. 549. But an agreement for arbitration is valid, even if it provides for the determination of liability. If executory, a breach will support an action for damages. *Hamilton* v. *Home Insurance Co.*, 137 U. S. 370, 385–386. If executed,—that is, if the award has been made,—effect will be given to the award in any appropriate proceeding at law, or in equity. *Karthaus* v. *Ferrer*, 1 Pet. 222; *Burchell* v. *Marsh*, 17 How. 344; *Bayne* v. *Morris*, 1 Wall. 97. And, although there is no federal legislation on the subject, an executory agreement, however comprehensive, will, if made a rule of court, be

[1] Mr. Justice Story said (p. 821): "Courts of Equity do not refuse to interfere to compel a party specifically to perform an agreement to refer to arbitration, because they wish to discourage arbitrations, as against public policy. On the contrary, they have and can have no just objection to these domestic forums, and will enforce, and promptly interfere to enforce their awards when fairly and lawfully made, without hesitation or question. But when they are asked to proceed farther and to compel the parties to appoint arbitrators whose award shall be final, they necessarily pause to consider, whether such tribunals possess adequate means of giving redress, and whether they have a right to compel a reluctant party to submit to such a tribunal, and to close against him the doors of the common Courts of justice, provided by the Government to protect rights and to redress wrongs."

enforced in courts of the United States by any appropriate process. *Heckers* v. *Fowler*, 2 Wall. 123.[2]

In admiralty, also, agreements to submit controversies to arbitration are valid. Reference of maritime controversies to arbitration has long been common practice.[3] *Houseman* v. *Schooner North Carolina*, 15 Pet. 40, 45. The insertion in a charter party of a provision for such settlement of disputes arising thereunder was practiced, at least, as early as the eighteenth century. *Thompson* v. *Charnock*, 8 Durnford & East, 139. For breach of an executory agreement a libel for damages will lie.[4] An executory agreement may be made a rule of court. *United States* v. *Farragut*, 22 Wall. 406, 419; *Kleine* v. *Catara*, 2 Gall. 61.

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[2] See, also, *Thornton* v. *Carson*, 7 Cranch, 596; *Carnochan* v. *Christie*, 11 Wheat. 446; *Lutz* v. *Linthicum*, 8 Pet. 165; *Alexandria Canal Co.* v. *Swann*, 5 How. 83; *York & Cumberland R. R. Co.* v. *Myers*, 18 How. 246; *Newcomb* v. *Wood*, 97 U. S. 581, 583. The practice of making the agreement for arbitration a rule of court was introduced by Stat. 9 & 10, William III, c. 15. See Russell on Arbitrators, 5th ed., 52.

[3] In England maritime controversies were settled by arbitration as early as 1320. Selden Society, Select Pleas in the Court of Admiralty, Vol. 1, pp. xxii, xxiii. After the establishment of that court (about 1340, *ibid* xiv) arbitration became a common mode of settling disputes in shipping cases. "The parties appear to have usually executed a bond or entered into recognizance in the Admiralty Court to execute the award; there are several suits to enforce such a bond or to compel performance of the award." *Ibid.* lxix; lxi; [1539], p. 90; [1540], p. 101; Vol. II; [1548], p. 18; [1571], p. lxx; [1573], p. lxxi; [1575], p. 39; [1589], p. 44.

The phraseology of the arbitration clause here in question is identical with that contained in the common form of the time charter party long in use. Scrutton, Charter Parties and Bills of Lading (1886), pp. 268, 270. The form appears as clause 15 of the charter party executed in New York in 1885 which was involved in *Compania Bilbaina* v. *Spanish-American Light & Power Co.*, 146 U. S. 483.

[4] See *Ross* v. *Compagnie Commerciale, etc.*, 45 Fed. 207, 208; *Munson* v. *Straits of Dover S. S. Co.*, 99 Fed. 787; 102 Fed. 926; *Aktieselskabet, Korn-Og, etc.* v. *Rederiaktiebolaget Atlanten*, 250 Fed. 935, 937.

An award will be given full effect.[5] The agreement whether executory or executed, can not be enforced in admiralty by specific performance; merely because that court lacks the power to grant equitable relief. *The Eclipse*, 135 U. S. 599, 608.[6] The executory agreement (perhaps in deference to the rule prevailing at law and in equity) will not be given effect as a bar to a libel on the original cause of action. The reluctance of the admiralty court to lend full aid goes, however, merely to the remedy. The substantive right created by an agreement to submit disputes to arbitration is recognized as a perfect obligation.[7]

By reason of the saving clause, state courts have jurisdiction *in personam*, concurrent with the admiralty courts, of all causes of action maritime in their nature arising under charter parties. Judiciary Act of September 24, 1789, c. 20, § 9, 1 Stat. 73, 77; Judicial Code, § 24, par. 3; *Leon* v. *Galceran*, 11 Wall. 185; *Schoonmaker* v. *Gilmore*, 102 U. S. 118; *Chappell* v. *Bradshaw*, 128 U. S. 132; *De Lovio* v. *Boit*, 2 Gall. 398, 475. The "right of a common law remedy", so saved to suitors, does not, as has been held in cases which presently will be mentioned, include

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[5] See *McConnochie* v. *Kerr*, 9 Fed. 50, 57, 58; *Toledo S. S. Co.* v. *Zenith Transp. Co.*, 184 Fed. 391, 401; *Hannevig* v. *Sutherland & Co.*, 256 Fed. 445.

[6] Admiralty is likewise unable to afford relief by way of reformation of a marine contract, *Andrews* v. *Essex Fire & Marine Ins. Co.*, 3 Mason, 6, 16; or to set it aside for fraud, *Dean* v. *Bates*, 2 Woodb. & M. 87, 90; or to establish an equitable title in a ship; or to take an account among part owners, *Kellum* v. *Emerson*, 2 Curt. 79, 82; or to put an equitable owner of a ship into possession, *Kynoch* v. *The Propeller S. C. Ives*, Newb. Ad. 205, 211. In all such cases, as in the case of specific performance, the relief must be sought in a court of equity.

[7] See *United States Asphalt Refining Co.* v. *Trinidad Lake Petroleum Co.*, 222 Fed. 1006; *Aktieselskabet, Korn-Og, etc.* v. *Rederiaktiebolaget Atlanten*, 232 Fed. 403, 405; *The Eros*, 241 Fed. 186, 191.

attempted changes by the States in the substantive admiralty law, but it does include all means other than proceedings in admiralty which may be employed to enforce the right or to redress the injury involved. It includes remedies *in pais*, as well as proceedings in court; judicial remedies conferred by statute, as well as those existing at the common law; remedies in equity, as well as those enforceable in a court of law. *Knapp, Stout & Co.* v. *McCaffrey*, 177 U. S. 638, 644, *et seq.*; *Rounds* v. *Cloverport Foundry & Machine Co.*, 237 U. S. 303. A State may not provide a remedy *in rem* for any cause of action within the admiralty jurisdiction. *The Hine* v. *Trevor*, 4 Wall. 555; *The Glide*, 167 U. S. 606. But otherwise, the State, having concurrent jurisdiction, is free to adopt such remedies, and to attach to them such incidents, as it sees fit. New York, therefore, had the power to confer upon its courts the authority to compel parties within its jurisdiction to specifically perform an agreement for arbitration, which is valid by the general maritime law, as well as by the law of the State, which is contained in a contract made in New York and which, by its terms, is to be performed there.

This state statute is wholly unlike those which have recently been held invalid by this Court. The Arbitration Law deals merely with the remedy in the state courts in respect of obligations voluntarily and lawfully incurred. It does not attempt either to modify the substantive maritime law or to deal with the remedy in courts of admiralty. The Workmen's Compensation Laws involved in *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205; *Clyde S. S. Co.* v. *Walker*, 244 U. S. 255; *Peters* v. *Veasey*, 251 U. S. 121; and *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, were declared invalid, because their provisions were held to modify or displace essential features of the substantive maritime law. In *Union Fish Co.* v. *Erickson*, 248 U. S. 308, the state statute did not deal with the substantive maritime law. It was held invalid, because, as construed

and applied, it attempted to modify the remedial law of the admiralty courts. The state statutes involved in all the other cases were declared valid. Those giving the substantive right to recover for negligence resulting in death were upheld, because they merely supplemented the substantive maritime law and did not conflict with any essential feature of it. *Western Fuel Co.* v. *Garcia*, 257 U. S. 233; *Great Lakes Dredge & Dock Co.* v. *Kierejewski*, 261 U. S. 479. See also *Steamboat Co.* v. *Chase*, 16 Wall. 522; *Sherlock* v. *Alling*, 93 U. S. 99, 104; *The Hamilton* 207 U. S. 398; *La Bourgogne*, 210 U. S. 95, 138. The Workmen's Compensation Laws involved in other cases were upheld, because their provisions, as applied, were found not to be in conflict with any essential feature of the general maritime law. *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U. S. 469; *Industrial Commission* v. *Nordenholt Co.*, 259 U. S. 263. No state statute was involved in *Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372. The Court held there that under the general maritime law the seaman had no substantive right to recover; that this rule of substantive maritime law applied whether he sued in the state courts or in the court of admiralty; and that the Seaman's Act of 1915 did not change this rule of substantive law. In no case has this Court held void a state statute which neither modified the substantive maritime law, nor dealt with the remedies enforceable in admiralty.

As the constitutionality of the remedy provided by New York for use in its own courts is not dependent upon the practice or procedure which may prevail in admiralty, we have no occasion to consider whether the unwillingness of the federal courts to give full effect to executory agreements for arbitration can be justified.[8]

Reversed.

[8] See *The Atlanten*, 252 U. S. 313, 315; *United States Asphalt Refining Co.* v. *Trinidad Lake Petroleum Co.*, 222 Fed. 1006; *Aktieselskabet, Korn-Og, etc.* v. *Rederiaktiebolaget Atlanten*, 250 Fed. 935; *Atlantic Fruit Co.* v. *Red Cross Line*, 276 Fed. 319.

The separate opinion of Mr. Justice McReynolds.

This controversy arose out of a charter-party dated November 28, 1919, a maritime contract, which contains a clause providing for the settlement of disputes by arbitration. 233 N. Y. 373.

Parties to such agreements contract with reference to the maritime law; consequent rights and liabilities depend upon its rules and are the same in all courts, admiralty or state. This general doctrine, definitely stated in *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, has been reaffirmed and applied again and again. *Clyde S. S. Co.* v. *Walker*, 244 U. S. 255; *Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372; *Union Fish Co.* v. *Erickson*, 248 U. S. 308; *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149; *Western Fuel Co.* v. *Garcia*, 257 U. S. 233; *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U. S. 469; *Carlisle Packing Co.* v. *Sandanger*, 259 U. S. 255; *Industrial Commission* v. *Nordenholt Co.*, 259 U. S. 263; *Osaka Shosen Kaisha* v. *Pacific Lumber Co.*, 260 U. S. 490; *Great Lakes Co.* v. *Kierejewski*, 261 U. S. 479.

No admiralty court would enforce the arbitration clause of the charter-party before us—their accepted policy forbids. Accordingly, it was not obligatory upon the parties. The law of the sea became part of their agreement.

But it is said, under the local law a state court may enforce arbitration and thus effectuate the provision, although unenforceable in admiralty, since the statute relates to the remedy and not to substantive rights. In *Union Fish Co.* v. *Erickson*, an admiralty cause, we refused to give effect to the state statute of frauds, holding that the parties had contracted with reference to maritime law, not the local enactment. Here, also, the effort is to modify an agreement made with reference to the general rules of maritime law by applying the local law. Certainly this could not be done in an admiralty court;

no more should it be possible under state practice. If *Union Fish Co.* and *Erickson* had been before a state tribunal the applicable rule would have been the same and would have required enforcement of the contract notwithstanding the local statute. Obligations under maritime contracts do not vary with the tribunal.

Fifty years ago this Court pointed out the essential relationship between rights and remedies. *Von Hoffman* v. *City of Quincy*, 4 Wall. 535, 552. "Nothing can be more material to the obligation than the means of enforcement. Without the remedy the contract may, indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfilment wholly upon the will of the individual. The ideas of validity and remedy are inseparable, and both are parts of the obligation, which is guaranteed by the Constitution against invasion. The obligation of a contract 'is the law which binds the parties to perform their agreement.'"

Under the guise of providing remedies no state statute may add to or take from the obligations imposed by the contract within the admiralty jurisdiction. The doctrine concerning the general maritime law announced here over and over again forbids. If state courts can enforce provisions for compulsory arbitration contrary to the policy of the admiralty courts, what will become of the uniformity of maritime rules which the Constitution undertook to establish?

The Judicial Code, § 256, endows the District Court with exclusive jurisdiction "of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it." The remedy saved must relate to some right or liability given or imposed by maritime law—certainly not one which that law does

not recognize. Furthermore, common-law remedy is the thing excepted from the exclusive jurisdiction, not a remedy wholly unknown to that law. *The Moses Taylor*, 4 Wall. 411, 430, 431, distinctly announced this construction—

"The cognizance of civil causes of admiralty and maritime jurisdiction vested in the District Courts by the ninth section of the Judiciary Act, may be supported upon like considerations. It has been made exclusive by Congress, and that is sufficient, even if we should admit that in the absence of its legislation the State courts might have taken cognizance of these causes. But there are many weighty reasons why it was so declared. 'The admiralty jurisdiction,' says Mr. Justice Story, 'naturally connects itself, on the one hand, with our diplomatic relations and the duties to foreign nations and their subjects; and, on the other hand, with the great interests of navigation and commerce, foreign and domestic. There is, then, a peculiar wisdom in giving to the national government a jurisdiction of this sort which cannot be yielded, except for the general good, and which multiplies the securities for the public peace abroad, and gives to commerce and navigation the most encouraging support at home.'

"The case before us is not within the saving clause of the ninth section. That clause only saves to suitors 'the right of a common-law remedy, where the common law is competent to give it.' It is not a remedy in the common-law courts which is saved, but a common-law remedy. A proceeding *in rem*, as used in the admiralty courts, is not a remedy afforded by the common law; it is a proceeding under the civil law. When used in the common-law courts, it is given by statute."

The same view is approved by *The Hine* v. *Trevor*, 4 Wall. 555, 571; *The Glide*, 167 U. S. 606, 616, 617; and *Knapp, Stout & Co.* v. *McCaffrey*, 177 U. S. 638, 644, 648.

The latter cause "was clearly one *in personam* to enforce a common-law remedy." The opinion carefully points out that the state court enforced such a remedy and, further, (p. 640) that not until 1866, *The Moses Taylor,* was the exclusive character of admiralty jurisdiction brought to this Court's attention. Earlier opinions must be read accordingly, with *Southern Pacific Co.* v. *Jensen* and the uniformity of maritime rules in mind. *Rounds* v. *Cloverport Foundry,* 237 U. S. 303, 308, follows *Knapp, Stout & Co.* v. *McCaffrey.*

Even where permitted by local law state courts cannot entertain proceedings *in rem* for the reason stated by *The Moses Taylor.* "A proceeding *in rem,* as used in the admiralty courts, is not a remedy afforded by the common law; it is a proceeding under the civil law. When used in the common-law courts, it is given by statute." The same reason inhibits state courts from enforcing any remedy not recognized at common law when the controversy is within the admiralty cognizance. Common-law remedies are within the saving clause, and no others. It is not enough that one has been provided by statute.

The Hine v. *Trevor* (p. 571) declares—"But it could not have been the intention of Congress, by the exception in that section, to give the suitor all such remedies as might afterwards be enacted by State statutes, for this would have enabled the States to make the jurisdiction of their courts concurrent in all cases, by simply providing a statutory remedy for all cases. Thus the exclusive jurisdiction of the Federal courts would be defeated." This negatives the suggestion that the remedy of the saving clause includes any means other than proceedings *in rem* which may be provided for the enforcement of rights or to redress injuries.

Knapp, Stout & Co. v. *McCaffrey* (p. 648) clearly affirms that the thing saved to suitors is the right of a common-law remedy. "The true distinction between

such proceedings as are and such as are not invasions of the exclusive admiralty jurisdiction is this: If the cause of action be one cognizable in admiralty, *and* the suit be *in rem* against the thing itself, though a monition be also issued to the owner, the proceeding is essentially one in admiralty. If, upon the other hand, the cause of action be not one of which a court of admiralty has jurisdiction, *or* if the suit be *in personam* against an individual defendant, with an auxiliary attachment against a particular thing, or against the property of the defendant in general, it is essentially a proceeding according to the course of the common law, and within the saving clause of the statute (sec. 563) of a common-law remedy. The suit in this case being one in equity to enforce a common-law remedy, the state courts were correct in assuming jurisdiction."

I can find no authority for the broad claim that the "right of a common-law remedy" extends to any and all means other than proceedings *in rem* which may be employed to enforce rights or redress injuries, including remedies *in pais* as well as proceedings in court, those conferred by statute as well as those existing at common law. Neither *Knapp, Stout & Co.* v. *McCaffrey* nor *Rounds* v. *Cloverport Foundry* supports it. It conflicts with *The Hine* v. *Trevor*, and is clearly opposed by the reason advanced in *The Moses Taylor* for excluding proceedings *in rem* from state courts.

The court below has held [1] that the New York arbitration law, c. 275, Laws N. Y. 1920,[2] provides "a statutory

[1] *Matter of Berkovitz* v. *Arbib & Houlberg*, 230 N. Y. 261, 269.

[2] "Sec. 2. A provision in a written contract to settle by arbitration a controversy thereafter arising between the parties to the contract, or a submission hereafter entered into of an existing controversy to arbitration pursuant to title eight of chapter seventeen of the code of civil procedure, shall be valid, enforcible and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract."

legal remedy of a character unknown to the common law . . . declares a new public policy, and abrogates an ancient rule." This statutory remedy is not of the common law nor were the proceedings under review instituted to enforce such a remedy, as was *Knapp, Stout & Co.* v. *McCaffrey*. See *Southern Pacific Co.* v. *Jensen*.

If petitioner is right, why may not a State require the parties to any maritime contract to submit their controversies to varying methods of arbitration and thus introduce the very discord which framers of the Constitution intended to prevent by adopting general maritime rules as laws of the United States? Also why may it not apply other than common-law remedies to controversies within admiralty jurisdiction contrary to plain congressional enactment and repeated decisions of this Court?

To announce principles is not enough; they should be followed. I think opinions of this Court led the conclusion of the court below and require affirmation of its judgment.
